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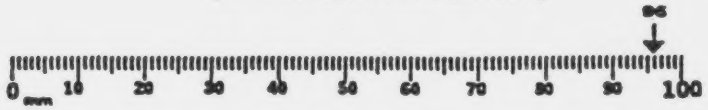

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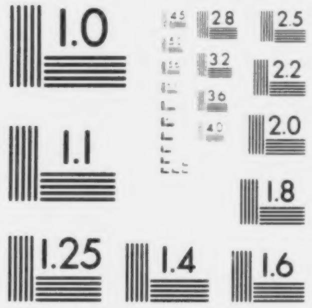

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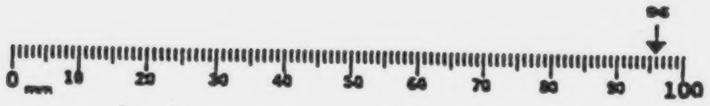

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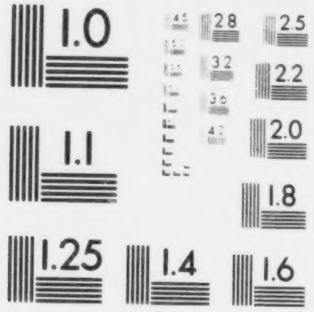

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INDIAN CLAIMS COMMISSION PROCEEDINGS

(2000) 12 ICCP

Reports

Blood Tribe / Kainaiwa Inquiry
1889 Akers Surrender

Duncan's First Nation Inquiry
1928 Surrender

Long Plain First Nation Inquiry
Loss of Use

Bigstone Cree Nation Inquiry
Treaty Land Entitlement

Responses

Responses of the Minister of Indian Affairs and Northern Development
to the
Mamaleleqala Qwe'Qwa'Sot'Enox Band
McKenna-McBride Applications Inquiry
and to the
'Namgis First Nation McKenna-McBride Applications Inquiry

Indian Claims Commission Proceedings

A Publication of

The Indian Claims Commission

(2000) 12 ICCP

Co-Chairs

Daniel J. Bellegarde
P.E. James Prentice, QC

Commissioners

Roger J. Augustine
Carole T. Corcoran
Elijah Harper
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FROM THE CO-CHAIRS

This is the 12th volume of the *Indian Claims Commission Proceedings*. We are pleased to present it on behalf of the Commissioners of the Indian Claims Commission. The volume includes four reports of the Commission and two letters from the Minister of Indian Affairs and Northern Development responding to the Commission's recommendations in other completed inquiries.

The first report is on the Commission's inquiry into the Blood Tribe/Kainaiwa claim regarding the 1889 Akers surrender. At issue was whether the surrender of 440 acres of reserve land in southern Alberta had been lawful. The Commission began its inquiry and, after an extensive review of the historical facts, including elders' testimony, the federal government agreed to accept the claim for negotiation. The report sets forth the evidence presented to the Commission, but makes no recommendations. The claim is now in mediation with the Commission.

The second report is on the Commission's inquiry into the surrender of seven parcels of reserve land from the Duncan's First Nation of Alberta in 1928. The First Nation asserted that the federal government breached its fiduciary obligations and the surrender provisions of the Indian Act in taking the land. The Commission's inquiry found that the government failed to act in the First Nation's best interest in one of the seven surrenders and recommended that that claim be accepted for negotiation of a settlement.

The third report enclosed is the Commission's ground-breaking inquiry into the Long Plain First Nation's claim to compensation for the loss of use of outstanding treaty entitlement land. In 1994, the Manitoba First Nation and the federal government reached an agreement to pay for outstanding entitlement land that was promised under Treaty 1 in 1876 but never provided. Negotiations broke down, however, over compensation. To try to resolve the issue, the parties turned to the Commission. The parties agreed to have the Commission consider this question: is the federal government lawfully obliged to compensate the First Nation for the loss of use of the treaty land entitlement (TLE) shortfall acreage?

After a thorough review of the facts and the law, the Commission found that the government is lawfully obliged to compensate the First Nation for the loss of use of reserve land, land that was not provided until 118 years after it was promised. The Commission found that, regardless of the government's knowledge or motives at the time, general common law principles regarding compensation for loss of use should apply to TLE claims.

The final report involves a claim put forward by the Bigstone Cree Nation of Alberta that was accepted for negotiation mid-inquiry. At issue was whether members of the First Nation who adhered to Treaty 8 after the first government population count in 1913 were included in the TLE calculations. The claim was rejected in 1989 and 1996 but, following the government's acceptance of the Commission's recommendation to change the federal TLE policy, the government finally accepted the claim.

Also contained in this volume of the Proceedings are copies of two letters from the Minister of Indian Affairs and Northern Development with respect to the claims of the Mamaleleqala Qwe'Qwa'Sot'Enox Band and the 'Namgis First Nation. In the letters the Minister writes that the Government of Canada rejects the Commission's recommendations regarding these claims.

Daniel J. Bellegarde Co-Chair	P.E. James Prentice, QC Co-Chair

ABBREVIATIONS

AC	Appeal Cases
BCCA	British Columbia Court of Appeal
BCR	Band Council Resolution
CA	Court of Appeal
CNLR	Canadian Native Law Reporter
CPR	Canadian Patent Reporter
DIAND	Department of Indian Affairs and Northern Development
DLR	Dominion Law Reports
DLS	Dominion Land Surveyor
DOFS	date of first survey
DSGIA	Deputy Superintendent General of Indian Affairs
FC	Canada Federal Court Reports
FCA	Federal Court Appeal Division
FCTD	Federal Court Trial Division
FTR	Federal Trial Reports
HL	House of Lords
IAB	Indian Affairs Branch
ICC	Indian Claims Commission
ICCP	Indian Claims Commission Proceedings
IR	Indian Reserve
NA	National Archives of Canada
NR	National Reporter
NSR	Nova Scotia Reports
NWMP	North-West Mounted Police
OR	Ontario Reports
OWN	Ontario Weekly Notes

PAA	Provincial Archives of Alberta
PC	Privy Council
QB	Court of Queen's Bench
RSA	Revised Statutes of Alberta
RSC	Revised Statutes of Canada
SC	Statutes of Canada
SCC	Supreme Court of Canada
SCR	Canada Supreme Court Reports
SCW	Specific Claims West
SGIA	Superintendent General of Indian Affairs
TD	Trial Division
TLE	treaty land entitlement
WWR	Western Weekly Reports
UFA	United Farmers of Alberta

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INDIAN CLAIMS COMMISSION

BLOOD TRIBE / KAINAIWA INQUIRY
1889 AKERS SURRENDER

PANEL

Commission Co-Chair P.E. James Prentice, QC
Commission Co-Chair Daniel J. Bellegarde
Commissioner Carole T. Corcoran

COUNSEL

For the Blood Tribe / Kainaiwa
Lesia Ostertag

To the Indian Claims Commission
David E. Osborn, QC

JUNE 1999

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PART I

INTRODUCTION

On April 15, 1998, Canada informed the Blood Tribe / Kainaiwa that its specific claim regarding the 1889 Akers surrender had been accepted for negotiation of a settlement.[1] Meetings were then scheduled to start negotiations.[2] At issue in this claim is a clerical error in a treaty amendment which, according to the First Nation, the federal government failed to correct and which resulted in the federal government's taking an unlawful surrender of 440 acres of mineral-rich reserve land without full consent or compensation.

The federal government initially rejected this claim. This rejection was reversed in part because of elders' oral history concerning the circumstances of the surrender, which was brought to light during the Commission's community sessions, and in part because of developments in case law, in particular, the *Apsassin*[3] decision.

This report sets out the background to the First Nation's claim and is based entirely on the documents provided by the First Nation and by the Specific Claims Branch of the Department of Indian Affairs and Northern Development (DIAND) to the Indian Claims Commission. In view of Canada's decision to accept the claim for negotiation of a settlement, no further steps have been taken by the Commission to inquire into the First Nation's claim, and we make no findings of fact. This report contains a brief summary of the claim and is intended only to inform the public about the nature of the issues involved and that the First Nation's claim has been accepted for negotiation under the Specific Claims Policy.

In April 1995, the Blood Tribe / Kainaiwa submitted a specific claim to the Minister of Indian Affairs and Northern Development regarding the September 2, 1889, surrender of 440 acres from the Blood reserve.[4] In August 1995, DIAND advised the First Nation that a portion of its specific claim, the Akers claim, disclosed an "outstanding lawful obligation" to the First Nation.[5] However, DIAND rejected the claim that the surrender was unlawful.[6] Subsequently, in August 1996, the Blood Tribe / Kainaiwa requested an inquiry into that rejected claim by the Commission.[7] The inquiry was held in abeyance at the request of the First Nation until the conclusion of the first part of the Akers claim was ratified by their membership in March 1997, thereby activating the inquiry.[8]

---

[1] John Sinclair, ADM, Department of Indian Affairs and Northern Development (DIAND), to Chief Chris Shade, Blood Tribe / Kainaiwa, April 15, 1998 (ICC file 2108-25-1) (reproduced as Appendix A).

[2] Lesia Ostertag, Counsel to Blood Tribe / Kainaiwa, to Ron Maurice, Commission Counsel, Indian Claims Commission (ICC), and Christopher Fleck, DIAND, September 15, 1998 (ICC file 2108-25-1)

[3] *Blueberry River Indian Band v. Canada*, [1995] 4 SCR 344.

A planning conference was scheduled for August 1, 1997,[9] in advance of which the parties corresponded to clarify the issues relating to the inquiry and their preliminary positions.[10] Later in August the Commission circulated a summary of the proceedings.[11] Counsel to the First Nation also circulated submissions on the procedural issue of whether the onus of proof shifts to the Crown in an inquiry where evidence is inconclusive.[12] In September 1997, the Commission circulated a revised summary of the planning conference,[13] DIAND requested additional amendments,[14] and the Commission further revised the summary.[15]

---

[4] Blood Tribe / Kainaiwa, Specific Claim Submission: The Akers Surrender, April 1995 (ICC Exhibit 4).

[5] Jack Hughes, Research Manager, DIAND, to Chief Roy Fox, Blood Tribe, August 14, 1995; John Sinclair, Assistant Deputy Minister, DIAND, December 19, 1995 (ICC file 2108-25-1).

[6] Jack Hughes, Research Manager, DIAND, to Chief Roy Fox, Blood Tribe, August 14, 1995 (ICC file 2108-25-1).

[7] Lesia Ostertag, Counsel to Blood Tribe / Kainaiwa, to Indian Claims Commission, August 29, 1996, attaching Band Council Resolution dated August 27, 1996, and Blood Tribe Supplemental Submission Relating to the Akers Surrender, August 19, 1996 (ICC file 2108-25-1) (reproduced as Appendix B).

[8] Lesia Ostertag, Counsel to Blood Tribe / Kainaiwa, to Ron Maurice, Commission Counsel, ICC, October 7, 1996; Annabel Crop Eared Wolf, Tribal Government Coordinator, to Indian Claims Commission, May 12, 1997; Ron Maurice, Commission Counsel, ICC, to Michel Roy, Director General, Specific Claims Branch, and W. Elliott, Senior General Counsel, DIAND, June 11, 1997 (ICC file 2108-25-1).

[9] Kathleen Lickers, Associate Legal Counsel, ICC, to Lesia Ostertag, Counsel to Blood Tribe / Kainaiwa, and Aly Alibhai, Legal Counsel, DIAND, July 11, 1997 (ICC file 2108-25-1).

[10] Aly Alibhai, Legal Counsel, DIAND, to Kathleen Lickers, Associate Legal Counsel, ICC, July 24, 1997; Lesia Ostertag, Counsel to Blood Tribe / Kainaiwa, to Kathleen Lickers, Associate Legal Counsel, ICC, July 25, 1997 (ICC file 2108-25-1).

[11] Ron Maurice, Commission Counsel, ICC, to Lesia Ostertag, Counsel to Blood Tribe / Kainaiwa, and Aly Alibhai, Counsel, DIAND, August 18, 1997, attaching ICC Planning Conference, Blood Tribe / Kainaiwa First Nation [Akers Surrender (1889)], Calgary, Alberta, August 1, 1997 (ICC file 2108-25-1).

[12] Lesia Ostertag, Counsel to Blood Tribe / Kainaiwa, to Ron Maurice, Commission Counsel, ICC, August 28, 1997 (ICC file 2108-25-1).

[13] Ron Maurice, Commission Counsel, ICC, to Lesia Ostertag, Counsel to Blood Tribe / Kainaiwa, and Aly Alibhai, Counsel, DIAND, September 5, 1997, attaching Revised Summary, Indian Claims Commission Planning Conference, Blood Tribe / Kainaiwa First Nation [Akers Surrender (1889)], Calgary, Alberta, August 1, 1997 (ICC file 2108-25-1).

[14] Aly Alibhai, Counsel, DIAND, to Ron Maurice, Commission Counsel, ICC, September 8, 1997 (ICC file 2108-25-1).

[15] Ron Maurice, Commission Counsel, ICC, to Lesia Ostertag, Counsel to Blood Tribe / Kainaiwa, and Aly Alibhai, Counsel, DIAND, September 16, 1997, attaching Summary (Revised as of September 16, 1997), Indian Claims Commission Planning Conference, Blood Tribe / Kainaiwa First Nation [Akers Surrender (1889)], Calgary, Alberta, August 1, 1997 (ICC file 2108-25-1).

A community session for the inquiry was held on October 22-23, 1997,[16] in advance of which the First Nation asked the Commission about how to gather oral history evidence from members of the Blood Tribe, as well as on how to use historical reports.[17] At the community session, elders of the First Nation provided interesting and pertinent information, in particular relating to the effect that no valid surrender had ever taken place. Subsequently, a copy of the exhibits for the claim was circulated among the parties,[18] along with other relevant documents.[19]

In December 1997, DIAND advised the parties of its request that the Department of Justice undertake a further review of the 1889 Akers surrender, based, in part, on "new developments in the law since the time the DOJ first rendered its opinion with respect of the validity of the Akers 1889 surrender."[20] DIAND further advised that such a review would take into account the First Nation's written submissions to date, along with evidence gathered from the community session and in the course of the inquiry. Accordingly, the inquiry was held in abeyance until the Department of Justice had rendered its opinion, which was expected to take "a few months."[21]

Although all parties agreed to this delay, the First Nation expressed its concern that the claim be resolved as quickly as possible and requested that the inquiry proceed immediately after February 20, 1998, in the event no resolution was pending.[22] On February 25, 1998, the federal government advised the First Nation that the review of the Akers surrender of 1889 had been completed, and that a formal response was forthcoming.[23]

---

[16] ICC Transcript, October 22 and 23, 1997 (Senator Gladstone Hall).

[17] Lesia Ostertag, Counsel to Blood Tribe / Kainaiwa, to Ron Maurice, Commission Counsel, ICC, September 26, 1997 (ICC file 2108-25-1).

[18] Ralph Keesickquayash, Associate Legal Counsel, ICC, to Lesia Ostertag, Counsel to Blood Tribe / Kainaiwa, and Aly Alibhai, Counsel, DIAND, November 5, 1997 (ICC file 2108-25-1).

[19] Isabelle Tessier, Access to Information and Privacy (ATIP) Review Analyst, DIAND, to Fred Isaac, ICC, December 1, 1997; Betty Recollet, ICC, to Carol Etkin, DIAND, January 15, 1998, attaching transcripts for the Blood Tribe / Kainaiwa Inquiry (ICC file 2108-25-1).

[20] Anne-Marie Robinson, Director, Policy and Research Directorate, DIAND, Specific Claims Branch, to Commissioners P.E. James Prentice, Carole Corcoran, and Dan Bellegarde, ICC, December 19, 1997 (ICC file 2108-25-1).

[21] Anne-Marie Robinson, Director, Specific Claims Branch, DIAND, to Commissioners P.E. James Prentice, Carole Corcoran, and Dan Bellegarde, ICC, December 19, 1997 (ICC file 2108-25-1).

[22] Dorothy First Rider, Kainaiwa, to Anne-Marie Robinson, Director, Specific Claims Branch, DIAND, and Commissioner P.E. James Prentice, ICC, January 6, 1998 (ICC file 2108-25-1).

[23] Lesia Ostertag, Counsel to Blood Tribe / Kainaiwa, to Anne-Marie Robinson, Director, Specific Claims Branch, DIAND, March 20, 1998; Anne-Marie Robinson, Director, Specific Claims Branch, DIAND, to Lesia Ostertag, Counsel to Blood Tribe / Kainaiwa, April 3, 1998 (ICC file 2108-25-1).

MANDATE OF THE INDIAN CLAIMS COMMISSION

The Commission was established in 1991 to assist First Nations and Canada in the negotiation and fair resolution of specific claims. The Commission's mandate to conduct inquiries pursuant to the *Inquiries Act* is set out in a commission issued on September 1, 1992. The Order in Council directs:

> that our Commissioners on the basis of Canada's Specific Claims Policy ... by considering only those matters at issue when the dispute was initially submitted to the Commission, inquire into and report on:
>
> a) whether a claimant has a valid claim for negotiation under the Policy where that claim has already been rejected by the Minister; and
>
> b) which compensation criteria apply in negotiation of a settlement, where a claimant disagrees with the Minister's determination on the applicable criteria.[24]

Thus, if the Commission had completed the inquiry into the Blood Tribe / Kainaiwa's claim, the Commissioners would have evaluated that claim based upon Canada's Specific Claims Policy. DIAND has explained the Policy in a booklet entitled *Outstanding Business: A Native Claims Policy – Specific Claims*.[25] In particular, the booklet states that when considering specific claims:

> The government's policy on specific claims is that it will recognize claims by Indian bands which disclose an outstanding "lawful obligation," i.e., an obligation derived from the law on the part of the federal government.
>
> A lawful obligation may arise in any of the following circumstances:
>
> i) The non-fulfillment of a treaty or agreement between Indians and the Crown.
>
> ii) A breach of an obligation arising out of the *Indian Act* or other statutes pertaining to Indians and the regulations thereunder.
>
> iii) A breach of an obligation arising out of government administration of Indian funds or other assets.
>
> iv) An illegal disposition of Indian land.

---

[24] Commission issued September 1, 1992, pursuant to Order in Council PC 1992-1730, July 27, 1992, amending the Commission issued to Chief Commissioner Harry S. LaForme on August 12, 1991, pursuant to Order in Council PC 1991-1329, July 15, 1991; reprinted in (1994) 1 ICCP xv.

[25] DIAND, *Outstanding Business: A Native Claims Policy – Specific Claims* (Ottawa: Minister of Supply and Services, 1982), 20; reprinted in (1994) 1 ICCP 171-85 (hereafter *Outstanding Business*).

The Policy also addresses the following types of claims which fall under the heading "Beyond Lawful Obligation":

> i) Failure to provide compensation for reserve lands taken or damaged by the federal government or any of its agencies under authority.
>
> ii) Fraud in connection with the acquisition or disposition of Indian reserve land by employees or agents of the federal government, in cases where the fraud can be clearly demonstrated.[26]

The Commission has the authority to review thoroughly the historical and legal bases for the claim and the reasons for its rejection with the claimant and the government. The *Inquiries Act* gives the Commission wide powers to conduct such an inquiry, to gather information, and even to subpoena evidence if necessary. If, at the end of an inquiry, the Commission concludes that the facts and law support a finding that Canada owes an outstanding lawful obligation to the claimant First Nation, it may recommend to the Minister of Indian Affairs and Northern Development that the claim be accepted for negotiation.

THE CLAIMS PROCESS

As outlined in *Outstanding Business*, a First Nation may submit its specific claim to the Minister of Indian Affairs, who acts on behalf of the Government of Canada. The claimant First Nation begins the process by submitting a clear and concise statement of claim, along with a comprehensive historical and factual background on which the claim is based. The claim is referred to DIAND's Specific Claims Branch, which usually conducts its own confirming research into a claim, makes claim-related research findings in its possession available to the claimants, and consults with them at each stage of the review process.

Once all the necessary information has been gathered, the facts and documents will be referred to the Department of Justice for advice on the federal government's lawful obligation. Generally, if the Department of Justice finds that the claim discloses an outstanding lawful obligation, the First Nation is so advised, and the Specific Claims Branch will offer to enter into compensation negotiations.

---

[26] *Outstanding Business*, 20; reprinted in (1994) 1 ICCP 171-85.

The Commission's Planning Conferences

In view of the Commissioners' broad authority to "adopt such methods ... as they may consider expedient for the conduct of the inquiry," they have placed great emphasis on the need for flexibility and informality and have encouraged the parties to be involved as much as is practicable in the planning and conduct of the inquiry. It is to this end that the Commission developed the planning conference as a forum in which representatives of the First Nation and Canada meet to discuss and resolve issues in a cooperative manner.

Planning conferences have been chaired by the Commission to plan jointly the inquiry process. Briefing material is prepared by the Commission and sent to the parties in advance of the planning conference so as to facilitate an informed discussion of the issues. The main objectives of the planning conference are to identify and explore the relevant historical and legal issues; to identify which historical documents the parties intend to rely on; to determine whether the parties intend to call elders, community members, or experts as witnesses; and to set time frames for the remaining stages of the inquiry, in the event that the parties are unable to resolve the matters in dispute. The first planning conference also allows the parties an opportunity to discuss whether there are any preliminary issues regarding the scope of the issues, or the mandate of the Commission.

Depending on the nature and complexity of the issues, there may be more than one planning conference. The parties are given an opportunity, often for the first time, to discuss the claim face to face. The parties themselves are able to review their position in the light of new or previously unrevealed facts and the constantly evolving law. Even if the planning conferences do not lead to a resolution of the claim and a formal inquiry process is necessary, the conferences assist in clarifying issues and help make the inquiry more effective.

PART II

HISTORICAL BACKGROUND

BACKGROUND TO THE FIRST NATION'S CLAIM

On September 22, 1877, the Blood Tribe / Kainaiwa signed Treaty 7.[27] Under the terms of the treaty, a reserve was set aside for the Blackfeet, Blood, and Sarcee Bands. The reserve is described therein as

> a belt of land on the north side of the Bow and South Saskatchewan Rivers, of an average width of four miles along said rivers, down stream, commencing at a point on the Bow River twenty miles north-westerly of the Blackfoot Crossing thereof, and extending to the Red Deer River at its junction with the South Saskatchewan; also, for the term of ten years, and no longer, from the date of the concluding of this Treaty, when it shall cease to be a portion of said Indian reserves, as fully, to all intents and purposes as if it had not at any time been included therein, and without any compensation to individual Indians for improvements, of a similar belt of land on the south side of the Bow and Saskatchewan Rivers of an average width of one mile along said rivers, down stream; commencing at the aforesaid point on the Bow River, and extending to a point one mile west of the coal seam on said river, about five miles below the said Blackfoot Crossing; beginning again one mile east of the said coal seam and extending to the mouth of Maple Creek at its junction with the South Saskatchewan; and beginning again at the junction of the Bow River with the latter river, and extending on both sides of the South Saskatchewan in an average width on each side thereof of one mile, along said river against the stream, to the junction of the Little Bow River with the latter river....

The Blood Tribe was dissatisfied with the reserve located at Blackfoot Crossing.[28] On December 31, 1880, Indian Commissioner Edgar Dewdney reported to the Superintendent General of Indian Affairs that, after meeting with Chief

---

[27] *Treaty and Supplementary Treaty No. 7, made 22nd Sept., and 4th Dec., 1877, between Her Majesty the Queen and the Blackfeet and Other Indian Tribes, at the Blackfoot Crossing of Bow River and Fort Macleod* (1877; repr. DIAND Publication No. QS-0575-000-EE-A, Ottawa: Queen's Printer, 1966).

[28] Blackfoot and Blood Chiefs, to Lt. Gov. Alexander Morris, Province of Manitoba and N.W.T., January 1, 1876, "Blackfoot and Blood Chiefs Petition," Provincial Archives of Manitoba, Alexander Morris Papers, document 1265 (ICC Documents, pp. 1-2).

Mekasto (also known as Chief Red Crow) at Fort Macleod, the tribe agreed to surrender its interest in the Blackfoot Crossing Reserve in exchange for a new reserve.[29] The Commissioner reported:

> The Bloods, a portion of the Blackfeet Nation ... notified me last year that they were not content with their reserve as agreed upon to be given them at the time of the treaty. I reported this matter to the Government last winter, and an Order in Council was passed authorizing Colonel Mcleod and myself to meet the chiefs and endeavour to make a satisfactory arrangement by which the wishes of the Blood could be carried out.
>
> On arriving at Fort Macleod, I found a large portion of the Blood Indians awaiting my arrival, for the purpose of hearing what determination the Government had come to in regard to that matter ... I informed the Blood Chief (Red Crow) that if he would give me a release of all his interest in the reserve situated at the Blackfoot Crossing, provided the Government would give him a reserve at the point he indicated, I would send an instructor with him and his band to the spot selected by himself where he could build houses and prepare some ground for next season and that I would recommend on my arrival below that a reserve be given to him at that point.[30]

After this meeting, the Indian Agent for Treaty 7 reported that Chief Red Crow had selected land on the south side of the Belly River from the fork of the Kootenai River eastward, and that the Blood Tribe had built 40 houses and begun cultivating land.[31]

On October 5, 1882, Assistant Indian Commissioner E.T. Galt reported on his inspection of the Blood Reserve to Commissioner Dewdney that two non-Indians had located themselves on the reserve, one of whom was David Akers:

> A man named Cochrane is in possession of a Ranch on the Blood Reserve, where he has occupied for several years, and the Indians are anxious that he should quit the premises. Cochrane estimates his improvements at $2,500 ... Farms Instructor McCord ... puts them down at $850.
>
> A man named Akers is also a squatter on this Reserve. His improvements are at the Eastern extremity of the Reserve, and are very considerable being known as Fort

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[29] Edgar Dewdney, Indian Commissioner, to the Superintendent General of Indian Affairs, December 31, 1880, Canada, Parliament, *Sessional Papers*, 1880-81, No. 14, "Annual Report of the Department of Indian Affairs for the Year Ended 31st December 1880," 80-81.

[30] Edgar Dewdney, Indian Commissioner, to the Superintendent General of Indian Affairs, December 31, 1880, Canada, Parliament, *Sessional Papers*, 1880-81, No. 14, "Annual Report of the Department of Indian Affairs for the Year Ended 31st December 1880," 80-81.

[31] Norman T. Mcleod, Indian Agent, Treaty No. 7, to Edgar Dewdney, Indian Commissioner, December 29, 1880, Canada, Parliament, *Sessional Papers*, 1880-81, No. 14, "Annual Report of the Department of Indian Affairs for the Year Ended 31st December 1880," 97-98.

> Whoop-up. I have desired the Indian Agent to estimate their value, with a view to making a settlement with Akers, as the Indians will not tolerate white men living on their Reserve. I may inform you that Fort Whoop-up was built ten years ago....[32]

The newly selected reserve, referred to as "Blood IR Number 148," was first surveyed by John C. Nelson during the summer of 1882. On December 29, 1882, Nelson reported to the Superintendent General of Indian Affairs that the survey had been completed, and that the area set aside was 650 square miles. He started his survey near Fort Whoop-Up[33] and traversed the St Mary's River down to the international border. The reserve was described as follows:

> a tract of country lying between, and bounded by, the St. Mary's and Belly rivers, from their junction below Whoop-up to an east and west line which forms its south boundary ... This east and west line lies about nine miles north of the International Boundary.[34]

On January 15, 1883, Nelson wrote to the Deputy Superintendent General of Indian Affairs, recommending that, if the reserve was extended to the junction of the St Mary's and Belly Rivers, it should not include the Fort Whoop-Up area claimed by Akers. Nelson felt the area was of little value compared to the compensation the department would have to pay Akers if he were forced to move from Fort Whoop-Up.[35]

On July 2, 1883, Chief Mekasto and the minor Chiefs of the Blood Tribe finalized the agreement to exchange reserve land as negotiated with Indian Commissioner Dewdney in 1880 and amended Treaty 7 of 1877.[36] The First Nation also requested a reserve in exchange for one granted in 1877. The new reserve contained 547.5 square miles for a band population of 546 people. The amended treaty also excluded the area where Fort Whoop-Up was located. However, owing to an error in the text of the treaty, the wrong quarter section was inserted in the amendment. The amendment describes the reserve as follows:

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[32] E.T. [Galt] to Edgar Dewdney, Indian Commissioner, October 5, 1882, National Archives of Canada (hereafter NA), RG 10, vol. 3637, file 7134, mfm reel C-10112 (ICC Documents, pp. 3-15).

[33] Fort Hamilton, built by Montana whiskey traders in 1869, was the first fort established in the area of present-day Fort Whoop-Up. In 1870 the fort was renamed Fort Whoop-Up. David Akers purchased the property in 1876.

[34] John C. Nelson, Dominion Land Surveyor (DLS), to Superintendent General of Indian Affairs, December 29, 1882, Canada, Parliament, *Sessional Papers*, 1883, No. 5, "Report of the Department of Indian Affairs for the Year Ended 31st December, 1882."

[35] John C. Nelson, DLS, to Deputy Superintendent General of Indian Affairs, January 15, 1883 (ICC Documents, pp. 16-17).

[36] *Treaty and Supplementary Treaty No. 7, made 22nd Sept., and 4th Dec., 1877, between Her Majesty the Queen and the Blackfeet and Other Indian Tribes, at the Blackfoot Crossing of Bow River and Fort Macleod*, (1877; repr. DIAND Publication No. QS-0575-000-EE-A, Ottawa: Queen's Printer, 1966).

> Commencing on the north bank of the St. Mary's River at a point in north latitude forty-nine degrees twelve minutes and sixteen seconds (49°12′16″); thence extending down the said bank of the said river to its junction with the Belly River; thence extending up the south bank of the latter river to a point thereon in north latitude forty-nine degrees, twelve minutes and sixteen seconds (49°12′16″), and thence easterly along a straight line to the place of beginning; excepting and reserving from out the same any portion of the ***north-east*** quarter of section number ***three***, in township number eight, in range twenty-two, west of the Fourth Principal Meridian, that may lie within the above mentioned boundaries.[37]

During the summer of 1883, Nelson concluded his survey of the new reserve.[38] In his field notes, Nelson reported that the survey was undertaken "in accordance with the Amended Treaty of July 2nd, 1883." Nelson reported that he excluded from the reserve "any portion of the north-west quarter of section three, township eight, range twenty-two, west of the fourth initial Meridian."[39] Based on a plan approved and confirmed by the Surveyor General dated March 28, 1884, the total acreage of sections 2, 3, and 11 contained 549 acres and the acreage within section 3 was 460 acres. The northwest quarter section where Fort Whoop-Up was located contained 118 acres and the area excluded by Nelson from the northeast quarter section contained 140 acres.[40]

On September 9, 1885, the Superintendent for the Department of the Interior, William Pearce, informed Commissioner Dewdney that Akers had applied for a grant of 600 acres located on the Blood Reserve as well as 379 acres outside the limits of the Blood Reserve.[41] Superintendent Pearce indicated that "the Indian Department would have to be considered before any definite action can be taken with that portion of Aker's claim lying between the Rivers."[42] On September 17, 1885, the Commissioner of Dominion Lands,

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[37] No. 203, Canada, ***Indian Treaties and Surrenders, from 1680 to 1890 in Two Volumes*** (1891; facsimile reprint, Saskatoon: Fifth House Publishers, 1993), 2: 134-35. Emphasis added.

[38] John C. Nelson, DLS, to Edgar Dewdney, Indian Commissioner, April 30, 1886 (ICC Documents, pp. 127-28).

[39] John C. Nelson, DLS, to Edgar Dewdney, Indian Commissioner, April 30, 1886 (ICC Documents, pp. 127-28).

[40] Plan of Township No. 8, Range 22, West of fourth Meridian, approved and confirmed for the Surveyor General and signed by E. Deville, March 28, 1884.

[41] William Pearce, Superintendent, Department of the Interior, to Edgar Dewdney, Indian Commissioner, September 9, 1885 (ICC Documents, pp. 84-90). The area requested was bounded by the Belly and St Mary's Rivers and by the southerly and westerly limits of section 3, township 8, range 22, west 4th meridian.

[42] William Pearce, Superintendent, Department of the Interior to Edgar Dewdney, Indian Commissioner, September 9, 1885 (ICC Documents, pp. 84-90).

H.H. Smith, reported to the Minister of Interior that he had instructed his agent to sell 195 acres located outside the Blood Reserve to Akers. Commissioner Smith also informed the Minister that the Indian Department would have to first relinquish its claim to the reserve lands before any grant of those lands could be made to Akers.[43] The Department of the Interior relayed its request to the Deputy Superintendent General of Indian Affairs, L. Vankoughnet.[44]

On November 25, 1885, Vankoughnet informed Commissioner Dewdney of the request and stated that "no permission to purchase or homestead can under any circumstances be given until Indians formally surrender the Land."[45] On December 7, 1885, Commissioner Dewdney, responded to the Superintendent General of Indian Affairs as follows:

> I have the honor to state that that portion of land claimed by Mr. Akers as shown on the township plan sent me of Township No. 8 Range 22 West of the 4th Meridian is not included in the Blood Indian Reserve and consequently the Department of the Interior may act with freedom in the matter ... I would beg to refer you to Mr. D.L.S. Nelson's report dated Jany. 15th 1883 addressed to the Supt. Genl. wherein the reasons are given for not including the land in question in the Blood Reserve.[46]

A letter to the Deputy Minister of the Interior followed on December 17, 1885, stating that the land claimed by Akers was not within the boundaries of the Blood Reserve.[47]

On February 13, 1886, the Department of the Interior informed Akers that, upon payment of $399, a patent would be issued under his name. The proposed patent included land:

> bounded on the South by the southerly limit of Sec. 3, in Tp. 8, Range 22, West of the 4th Meridian, produced west to a point 80 chains west of the south-east angle of the said Sec. 3, thence due North to the Belly River; bounded on the North by the Belly River and on the East by the St. Mary's River, which if the survey of Tp. 8 R 22 were extended into the territory lying between the Belly & St. Mary's river would include

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[43] H.H. Smith, Commissioner, Dominion Lands Commission, to Minister, Department of the Interior, September 17, 1885 (ICC Documents, pp. 91-92).

[44] P.B. Douglas, Assistant Secretary, Department of the Interior, to L. Vankoughnet, Deputy Superintendent General of Indian Affairs, November 18, 1885 (ICC Documents, p. 95).

[45] L. Vankoughnet, Deputy Superintendent General of Indian Affairs, to Edgar Dewdney, Indian Commissioner, November 25, 1885 (ICC Documents, pp. 96-97).

[46] Edgar Dewdney, Indian Commissioner, to Superintendent General of Indian Affairs, December 7, 1885 (ICC Documents, p. 99).

[47] L. Vankoughnet, Deputy Superintendent General of Indian Affairs, to Deputy Minister of the Interior, December 17, 1885 (ICC Documents, p. 100).

> that portion of the S.W. 1/4 (fractional) of Sec. 11, and of the fractional N.W. 1/4 of Sec. 2; and the whole of fractional Sec. 3, in said Township, containing 549 acres, more or less.[48]

On February 23, 1886, W.A. Austin of the Department of Indian Affairs alerted Deputy Superintendent General Vankoughnet that Mr Nelson's report of January 15, 1883, did not show any land being excluded between the St Mary's and Belly Rivers. He indicated that there was a contradiction between Commissioner Dewdney's letter of December 7, 1885, and Nelson's report. In referring to Nelson's report, Austin stated that he

> examined the Sketch 'e' and the portion colored as an Indian Reserve extend to the junction of those two rivers and does not exempt in anyway any portion of land lying between these rivers and the Southern Boundary which boundary is about 9 miles north of the International Boundary. . . .
>
> There is another tracing of this reserve in the office which shows the point in question not to be in the reserve as it is not coloured in – but the report does not refer to that tracing, and upon the face of this Trace Plan it is only mentioned as a key Plan in reference to the southern boundary of the reserve.[49]

On February 26, 1886, Vankoughnet asked the Department of the Interior to delay issuing a patent to Akers,[50] and the department agreed to comply with the request on March 15, 1886.[51]

On April 3, 1886, Commissioner Dewdney wrote to the Superintendent General of Indian Affairs that he had reviewed the correspondence relating to the amended treaty and noted an error concerning the description of land to be excluded from the reserve:

> I find that part of the quarter section upon which Whoop-Up is shewn on the plans as being built viz the N.W. 1/4 Sec. 3, Tp. 8 Range 22 west of the 4th meridian is not excluded by the wording of the amended treaty from the land comprised within the reserve and instead there of the NE 1/4 Sec. is mentioned.
>
> If it appears in this manner in the original treaty on file with the Department it certainly is an error as the intention was to exclude that quarter section viz the NW 1/4 on which Whoop-up now stands and either the incorrect description of the land

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[48] P.B. Douglas, Assistant Secretary, Department of the Interior, to J.P. Burpe, Secretary, Dominion Land Commissioner, February 13, 1886 (ICC Documents, pp. 107-08).

[49] W.A. Austin, Department of Indian Affairs, to L. Vankoughnet, Deputy Superintendent General of Indian Affairs, February 23, 1886 (ICC Documents, pp. 110-12).

[50] L. Vankoughnet, Deputy Superintendent General of Indian Affairs, to Deputy Minister of the Interior, February 26, 1886 (ICC Documents, pp. 116-17).

[51] P.B. Douglas, Assistant Secretary, Department of the Interior, to L. Vankoughnet, Deputy Superintendent General of Indian Affairs, March 15, 1886 (ICC Documents, p. 119).

> was furnished the Commissioners or the same was a clerical error and as Mr. Akers is I think entitled to it, I consider it would be advisable to arrange matters in such a manner as to enable him to acquire a proper title.
>
> For reasons which I cannot at present recall to mind it was considered at the time of granting the Indians their Reserve that no other portion of the tongue of land lying between the Reserves (sic) should be excluded for the benefit of Mr. Akers.[52]

In response to a request that he explain the circumstances surrounding the land claimed by Akers, Nelson reported on April 30, 1886, that he

> recommended that the fractional Section No. 3 at the junction of the St. Mary's & Belly River be not included in the Blood Reserve. It was however not considered necessary to exempt anything more than the quarter section on which 'Whoop-Up' is situated on account of Mr. David Akers claim. It appears that a clerical error has occurred in the wording of the treaty in which this land is described as the north-east instead of the north-west quarter of section three; but since in any case it will be necessary to secure the surrender of five additional fraction quarter sections in order to carry out the recommendations contained in Mr. Pearse's [sic] report, the error is probably of little consequence, at any rate the Blood Indians are well aware that Whoop-Up is not on their reserve.[53]

On May 10, 1886, Assistant Indian Commissioner Hayter Reed informed James F. Macleod of the clerical error in the treaty amendment of July 3, 1883, and instructed him to take the necessary step to correct the error.[54] On September 9, 1886, Macleod met with the majority of the male members of the Blood Tribe and concluded a treaty to amend the one signed on July 2, 1883. The amended treaty read in part:

> Now these Articles witness, that the parties hereto have agreed, and they do hereby agree, that the said north-west quarter of section three in the township and range aforesaid be the land excepted from the tract of land hereinbefore described, instead of the north-east quarter of the said section; and that the tract of land hereinbefore described, with the exception last mentioned, shall be and form the reservation granted to the said Blood Indians by Her Majesty the Queen, as fully and effectually as if the said north-east quarter of section three had not been particularly mentioned in the said treaty.[55]

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[52] Edgar Dewdney, Indian Commissioner, to Superintendent General of Indian, April 3, 1886 (ICC Documents, pp 120-22).

[53] John C. Nelson, DLS, to Edgar Dewdney, Indian Commissioner, April 30, 1886 (ICC Documents, pp 127-28)

[54] Hayter Reed, Assistant Indian Commissioner, to James F. Macleod, May 10, 1886 (ICC Documents, pp 129-31)

[55] No. 237, Canada, *Indian Treaties and Surrenders*, 2: 194

Chief Mekasto signed an affidavit stating that the proceedings were to correct a mistake in the description of the Blood Reserve in the treaty dated July 2, 1883.[56] An order in council dated December 9, 1886, was issued approving the amendment.[57]

Shortly after signing the 1886 amendment, it became apparent to the Department of the Interior and to the Indian Department that the amendment did not include any additional lands other than the northwest quarter of section 3 that Akers had requested be patented. On January 14, 1887, Deputy Minister of the Interior A.M. Burgess wrote to Vankoughnet, indicating that the following instructions had been sent to the Commissioner of Dominion Lands:

> as the land in question was found not to be included in any Indian Reserve, Akers' claim could be settled and instructions were accordingly sent to the Local Agent and entry granted Akers for this land. It now appears that a portion of Akers' claim has been included in the Blood Indian Reserve. Mr. Akers, you will understand, has been informed by this Department that he can purchase the piece of land ...[58]

On January 24, 1887, Vankoughnet asked Chief Surveyor Samuel Bray to report whether the land claimed by Akers was within the boundaries of the Blood reserve.[59] On January 26, 1887, Bray reported

> that the whole of the lands colored red on the Plan of township No. 8 Range 22 West of 4th M ... that lie between the Belly and St. Mary's Rivers are within and form part of the Blood Reserve, except for the small portion indicated by parallel brown lines on the above mentioned map, the said small portion being all that portion of the North West 1/4 of Section 3 (Tp. 8 R. 22 4th M) lying within the boundaries of the Blood Indian Reserve ... The meets [sic] and bounds of this reserve are set forth plainly and distinctly in the Treaty with the Blood Indians dated 2nd July 1883 (No. 203) the only difference being that the above mentioned land excepted from those meets [sic] and bounds is described as the North East 1/4 of Sec. 3 instead of the North West 1/4; this error has been corrected (vide, copy of O in C 9th Dec 1886) making the piece of land that portion of the North West 1/4 of Sec 3 & c the portion not included within the meets [sic] and bounds of the Reserve.[60]

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[56] No. 237, Canada, *Indian Treaties and Surrenders*, 2: 195.

[57] Order in Council, December 9, 1886 (ICC Documents, pp. 160-61).

[58] A.M. Burgess Deputy Minister of the Interior, to L. Vankoughnet, Deputy Superintendent General of Indian Affairs, January 14, 1887 (ICC Documents, pp. 165-69).

[59] L. Vankoughnet, Deputy Minister, Department of Indian Affairs, to Samuel Bray, Chief Surveyor, January 24, 1887 (ICC Documents, p. 172).

[60] Samuel Bray, Chief Surveyor, to L. Vankoughnet, Deputy Minister, Department of Indian Affairs, January 26, 1887 (ICC Documents, pp. 173-76).

On January 31, 1887, the Deputy Minister of the Interior was informed of Surveyor Bray's findings.[61]

On February 14, 1887, Deputy Minister Burgess informed the Deputy Superintendent General of Indian Affairs that

> as this Department has given Mr. Akers entry for this land upon information received from the Department of Indian Affairs, and as we are now informed that except so far as one fractional quarter section is concerned, the action taken cannot be recognized by the Indian Department, it will be for the Indian Department to come to an arrangement, amicable or otherwise, with Mr. Akers. I may say that Mr. Akers' case is rendered doubly hard as it now stands, by the fact that, taking for granted that nothing would occur to impair the decision arrived at by the Minister of the Interior in this case, he purchased a Military Bounty Warrant covering 320 acres of land, with the intention of applying it to the tract to be granted to him at this point, and he did so apply it by the special personal authority of the Minister of the Interior, when on the spot last July.[62]

On February 24, 1887, Vankoughnet wrote to Burgess, informing him that the Indian Commissioner has been requested to report on whether "under the circumstances of the case the Indians could not be persuaded to surrender the balance of the land patented to Mr. Akers."[63] There is no documentary evidence to show that any action was taken after instructions were sent to the Indian Commissioner in 1887.

On November 12, 1888, J.C. Nelson, who was in charge of Indian Reserve Surveys, reported to the Superintendent General of Indian Affairs that he had met with Chief Mekasto and the minor Chiefs of the Blood Tribe to discuss the boundaries of the reserve. During his visit, he retraced the boundaries, accompanied by Chief Mekasto, Blackfoot Old Women, White Calf, and the Indian Agent for the area, William Pocklington. On completion of this task, Mekasto stated that "the boundaries of his reserve as now fixed would never again be questioned."[64] Nelson also marked the northwest quarter of section 3, township 8, range 22, for Akers by planting iron posts at the corners.[65]

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[61] L. Vankoughnet, Deputy Minister, Department of Indian Affairs, to A.M. Burgess, Deputy Minister of the Interior, January 31, 1887 (ICC Documents, pp. 177-79).

[62] A.M. Burgess, Deputy Minister, Department of the Interior, to L. Vankoughnet, Deputy Superintendent General of Indian Affairs, February 14, 1887 (ICC Documents, pp. 181-83).

[63] L. Vankoughnet, Deputy Superintendent General of Indian Affairs, to A.M. Burgess, Deputy Minister, Department of the Interior, February 24, 1887 (ICC Documents, p. 187).

[64] John C. Nelson, DLS, to the Superintendent General of Indian Affairs, November 12, 1888 (ICC Documents, pp. 211-17).

[65] John C. Nelson, DLS, to the Superintendent General of Indian Affairs, November 12, 1888 (ICC Documents, pp. 211-17).

On January 10, 1889, Nelson wrote to the acting Deputy Minister of the Interior stating that:

> Akers might accept some of the vacant lands on the other side, viz the north east side, of the Belly & St. Mary's Rivers in lieu of certain lands, in the Blood Reserve....I had a conversation with [Mr. Akers] on this subject & gathered from what he said that he would willingly accept other lands in place of those lying within the reserve.[66]

On January 16, 1889, the Deputy Superintendent wrote to Akers inquiring if he had decided where he wanted to relocate.[67] Akers refused to move.[68] On March 8, 1889, the Assistant Secretary to the Department of the Interior wrote to Mr E.G. Kirby, the Dominion Lands Agent, informing him that the Department of Indian Affairs had advised that the quarter section of Fort Whoop-Up was not required for Blood Reserve and, therefore, "a patent for the half section can be issued to Akers."[69] Further unsuccessful attempts were made to ascertain if Akers would be willing to exchange his reserve holding for other lands outside the reserve.[70]

THE SURRENDER

On June 25, 1889, Deputy Superintendent General Vankoughnet instructed Indian Commissioner Hayter Reed to obtain a surrender from the Blood Tribe:

> in view of all the circumstances the only course now to pursue would appear to be to ask the Indians to surrender the land in question with a view to Mr. Akers' title thereto being perfected ... you are hereby authorized to do and I enclose a printed form of surrender and affidavit to be used in connection therewith. The proceeds in taking the surrender should be conducted strictly in conformity with the provisions of the Indian Act.[71]

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[66] John C. Nelson, DLS, to John R. Hall, Deputy Minister, Department of the Interior, January 10, 1889 (ICC Documents, pp. 226-27).

[67] L. Vankoughnet, Deputy Superintendent General of Indian Affairs, to David Akers, January 16, 1889 (ICC Documents, pp. 228-29).

[68] Conybeare and Galliher, Barristers & Solicitors for David Akers, to L. Vankoughnet, Deputy Superintendent General of Indian Affairs, April 9, 1889 (ICC Documents, p. 248).

[69] P.B. Douglas, Assistant Secretary, Department of the Interior, to E.G. Kirby, Dominion Lands Agent, March 8, 1889 (ICC Documents, p. 240).

[70] Hayter Reed, Indian Commissioner, to Conybeare & Galliher, Solicitor for David Akers, May 10, 1889 (ICC Documents, pp. 253-54); Hayter Reed, Indian Commissioner, to Superintendent General of Indian Affairs, June 7, 1889 (ICC Documents, pp. 260-61).

[71] L. Vankoughnet, Deputy Superintendent General of Indian Affairs, to Hayter Reed, Indian Commissioner, June 25, 1889 (ICC Documents, pp. 265-66).

On July 4, 1889, Commissioner Hayter Reed requested additional instructions regarding compensation and the amount of land to be surrendered.[72] On July 13, 1889, the acting Deputy Superintendent General, R. Sinclair, responded as follows:

> when taking the surrender you had better make the most favourable terms possible with the Indians, committing the Department as little as possible to any question of compensation, either in land or in any other way ... The Superintendent General doubts whether an equivalent in land could be given to the Indians in the immediate locality of the Reserve, and he considers that land at any distance from their Reserve would be comparatively valueless to them.[73]

The surrender was executed on September 2, 1889. The land surrendered was between the Belly and St Mary's Rivers to the limit of section 3, township 8, range 22, west fourth meridian with an area of 440 acres. The surrender instrument described the area as thus:

> that certain parcel or tract of land and premises, situate, lying and being in the said Blood Reserve in the District of Alberta, North West Territories containing by admeasurement about four hundred and forty acres be the same more or less and being composed of that portion of the Blood Reserve lying and being at the junction of the Belly and St. Mary's rivers, being bounded on two sides by the said Rivers, on the South side by the Southerly limit of section number three in Township number eight Range twenty two west of the fourth initial Meridian and on the west by the westerly limit of said section number three, saving and excepting the north west quarter of said section number three which has already been surrendered by us the said Indians on the ninth day of September one thousand eight hundred and eighty-six.[74]

On June 11, 1890, an order in council was issued accepting the surrender:

> The Minister states that the land covered by the surrender now submitted has been occupied for a number of years by Mr. David Akers, and it was included within the boundaries of the Blood Indian Reserve when the survey of the latter was made notwithstanding the proprietary rights to the land in question acquired by Mr. Akers before the date of the Treaty made with the Indians for the extinguishment of their claims in that portion of the North West Territories, and the object of the surrender

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[72] Hayter Reed, Indian Commissioner, to L. Vankoughnet, Deputy Superintendent General of Indian Affairs, July 4, 1889 (ICC Documents, pp. 267-68).

[73] R. Sinclair, Acting Deputy Superintendent General of Indian Affairs, to Hayter Reed, Indian Commissioner, July 13, 1889 (ICC Documents, p. 269).

[74] No. 282, Canada, *Indian Treaties and Surrenders, Volume III: Treaties 281-483* (Ottawa: C.H. Parelee Printer, 1912), 3: 3-5.

> now made is to enable Mr. Akers to complete his title to said land by negotiating for the same with the Department of the Interior.[75]

There is no documentary evidence indicating that compensation was mentioned or received for the lands surrendered.

The affidavit for the surrender was signed by Chief Mekasto on December 20, 1889. The explanation for the delay is provided in a letter dated January 8, 1890, sent by Indian Agent Pocklington to the Indian Commissioner:

> I have at length succeeded in inducing 'Red Crow' to make the affidavit before His Honour Judge Macleod releasing that portion of the Reserve claimed by W.D. Akers at Whoop-up on the 19th. I took 'Red Crow' to Macleod and en route spoke to him on the question at last he told me that Mr. Akers had told 'Day Chief' that he wanted the Indians to run him off the Reserve, no doubt with a view to making a claim against the Government for the same. I told 'Red Crow' he could not very well refuse to make the affidavit as he had already done so twice but unfortunately owing to an error in the survey, we wished him to make another. He at last said that if Mr. Justice Macleod and I said it was right he would make the affidavit.[76]

The two affidavits from Mekasto referred to by Pocklington involved the amendments to the 1877 treaty and the correction to the 1883 treaty. Neither of these affidavits involved a surrender of land. The parties have not provided any documentation regarding the minutes of the surrender, the voters list, or the results of the surrender vote.

POST-SURRENDER EVENTS

On August 5, 1892, a patent was issued to Akers for the lands discussed.[77] In 1893, the land held by Akers fell into the hands of his creditors, and Akers died in early 1894.[78] On April 3, 1894, Deputy Superintendent General Hayter Reed proposed to Assistant Indian Commissioner Forget that a portion of the Akers property be purchased and returned to reserve status.[79] However, before this proposal could be initiated, Indian Agent James Wilson was informed by the Dominion Lands Agent that the Department of Indian Affairs had no further control over these lands, and that a homestead grant had been granted to Mr William Arnold for the quarter section in dispute.[80]

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[75] Order in Council PC 1448, June 11, 1890 (ICC Documents, pp. 311-12).

[76] William Pocklington, Indian Agent, Blood Agency, to Hayter Reed, Indian Commissioner, January 8, 1890 (ICC Documents, pp. 303-06).

[77] The patent was for partial W ½ & SE ¼ of section 3 in township 8, range 22, containing 330 acres. John R. Hall, Secretary, Department of the Interior, to David Akers, October 5, 1892 (ICC Documents, pp. 354-56).

[78] James Wilson, Indian Agent, to A.E. Forget, Indian Commissioner, March 16, 1894 (ICC Documents, pp. 360-61).

[79] Hayter Reed, Deputy Superintendent General of Indian Affairs, to A.E. Forget, Indian Commissioner, April 3, 1894 (ICC Documents, pp. 362-63).

On June 19, 1894, Commissioner Hayter Reed was informed that Mekasto had questioned why the Department of Interior had granted Akers's land to others, given that Akers was the only person given land on the reserve with the the Blood Tribe's consent.[81] Assistant Indian Commissioner Forget informed Hayter Reed as follows:

> Upon enquiry into the matter I find that the Arnold entry is upon lands covered by the surrender of 440 acres in September 1889, which though the same is not stated in the document, were surrendered for the benefit of the late Mr. Akers only, and it can therefore be readily understood why the Indians cannot understand why the presence of any other than Akers or heirs on the land is permitted. It therefore occurs, in connection with the suggestion that the land surrendered in 1889 be again acquired, that as these lands were, although not so stated in the written surrender, released by the Indians for the purpose of permitting the Government to transfer the same to Akers, and that as is now shown by the acceptance by the Dominion Lands Agent of an entry by another person covering a portion of the said lands, a portion of same was not occupied by the person for whose benefit they were surrendered, they must still remain vested in the Government for such disposal as may seem most conducive to the interests of the Indians. As in this case the disposal most conducive to the welfare of the Indians is to reacquire the ownership of the land. I would suggest that such portions as have not actually been occupied by and belong to Akers estate, be restored by the Government to the band, and that the Department of the Interior be asked to cancel the Arnold entry.
>
> Regarding the Department's suggestion that the Territory included in the Akers property might advisedly be secured by the Indians by purchase. I would point out, as strengthening the request for the restoration of the lands not occupied by that estate, that apparently no consideration was ever received by the Indians as an offset to the value of the 440 acres which they relinquished solely to permit of the settlement of a claim which was being pressed against the Government by the said D.A. Akers.[82]

Despite repeated exchanges of correspondence between the Departments of the Interior and Indian Affairs, no action was taken from 1894 to 1970 to address the issue of the Akers surrender.[83] In 1970, the Department of Indian Affairs acquired the following parcels of land and assigned them reserve status: northeast quarter section of section 3, the fractional part of northwest quarter section of section 2 between the St Mary's and Belly Rivers and the fractional part of southwest quarter of section 11 between the St Mary's and Belly Rivers. No further evidence dating from between 1970 and 1995, the date at which the specific claim was submitted, was presented to the inquiry.[84]

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[80] W.H. Cottingham, Land Agent, Dominion Land Commission, to James Wilson, Indian Agent, June 15, 1894 (ICC Documents, p. 365).

[81] Unknown to Indian Commissioner, June 19, 1894 (ICC Documents, p. 366).

[82] A.E. Forget, Assistant Indian Commissioner, to Hayter Reed, Deputy Superintendent General of Indian Affairs, July 19, 1894 (ICC Documents, pp. 367-68).

[83] See ICC Documents, pp. 371-465.

TESTIMONY OF THE ELDERS

At the community meetings referred to earlier, the elders of the Blood Nation spoke in vivid terms about the traditional significance of the land that was the subject of the claim. They told the Commissioners of their respect for the land known to them as the "Place of Many People," which according to elder Pete Standingalone is known in Blackfoot as "akie-nes-qui."[85]

The land is part of a deep valley below the confluence of the Belly and St Mary's Rivers; it played a great role in the survival of the Blood Tribe, especially during the harsh winter months. As elder Rosie Day Rider told the Commissioners:

> It is a land that had plenty by way of those things that we need, wood, game, water. Our people used it to come together during the winter moons; they wintered in that area because it was plentiful in all that we needed.[86]

The necessity of that land to the survival of the Bloods was further explained by elder Rosie Red Crow:

> The land had many uses. It had all the things that we needed. It had the water, it had the wood that our people needed, it had the rocks that people used to weigh down the edges of the Teepees. The medicines that were found in that part of the land were numerous. It was a prime wintering place of our people because the temperatures were not as cold as in other places. There were many uses for that land. There is a tree that grows only there. During the winter time that horses will eat the bark of that tree. It grows no where else. The bark of that tree is like grain today to livestock. And it was important for the survival of our horses, particularly in harsh winters. And that tree only grows there.[87]

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[84] Blood Tribe / Kainaiwa Specific Claim Submission: The Akers Surrender, April 1995 (ICC Exhibit 4).
[85] ICC Transcript, December 2, 1997, vol. 2, p. 152 (Pete Standingalone).
[86] ICC Transcript, October 22/23, 1997, vol. 1, p. 39 (Rosie Day Rider).
[87] ICC Transcript, October 22/23, 1997, vol. 1, pp. 67-68 (Rosie Red Crow).

The land's importance was not only as a source of many of the practical necessities of life for the Bloods. Its significance was also historical and ceremonial in nature. This aspect was explained to the Commissioners by elder Louise Crop Eared Wolf, who advised that the land was not only an important source of the ceremonial red and yellow ochres used by the tribe, but also the best source of the stone needed for making sacred pipes. Regarding the land's historical significance to the Bloods, elder Louise Crop Eared Wolf told the Commissioners that:

> The land in question is a very sacred land to our people. Many of our ancestors lay in that particular part of the land. That's one of the reasons they call it the land where there is many people.... Not too far from there was where a small camp of our people were when they were attacked by people from the east. And it has come to be known as the site of the last great battle between our people and the people from the east.... It is like one of your graveyards. It is sacred to our people.[88]

Given the importance of the land, it may be understood why the Blood elders believe that a surrender of the land (if such had occurred) would have been an event of great significance in the history of the tribe. Its oral history, as passed down through the generations and conveyed to the Commissioners at the community sessions, does not include a retelling of any such event. Therefore it is not surprising that the Blood people find it incredible that Chief Red Crow could have knowingly surrendered the land in 1889.

This conclusion became evident when the elders were questioned by Commission Counsel and by the Commissioners themselves at the community sessions.

In his presentation to the Commission regarding the oral history and traditions of the Blood people, Wilton Good Striker advised that it was only in the 20th century that the language spoken by the Bloods came to include a word for "surrender."[89] Several of the elders, including Mary Louise Oka and Margaret Hind Man, commented upon the fact that Chief Red Crow did not understand or speak English, nor could he read or write. In the words of Margaret Hind Man:

> No, I did not hear about Red Crow or of Red Crow signing any document to sell or give away that piece land. He didn't know how to write nor did he know how to speak

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[88] ICC Transcript, December 2, 1996, vol. 2, pp. 197-99 (Louise Crop Eared Wolf).
[89] ICC Transcript, October 22/23, 1997, vol. 1, p. 29 (Wilton Good Striker).

> English, and I find it very strange that he would sign something that he didn't know what the contents were.[90]

If there was no word for "surrender" in the language spoken by Red Crow, and he did not speak or understand English, the Bloods find it difficult to see how he could have been made to understand the meaning of the surrender document. As a result, the Bloods believe that, if he were persuaded to mark a surrender document, apparently signifying his assent to it, the mark and the assent must have been obtained through misrepresentation or fraud. As stated by elder Louise Crop Eared Wolf:

> The Chieftains of the time knowingly would never sell or would never sign any document that proposed to sell or give away land. If in fact they did sign or place their mark, there must have been much by way of deceit. That was the time when none of our leaders neither understood nor could write nor read the English language. They had to rely on interpreters who in many cases were also unqualified to properly interpret what was being discussed.... Now, if in fact Red Crow and the other leaders were made to sign a document, I can only suspect that it was another act of deceit on somebody's part.[91]

Apart from Red Crow's inability to understand English, and the lack of a Blackfoot term to describe the surrendering of land, the elders relied upon their traditional knowledge of Red Crow's character to refute the theory that he would have assented to the surrender. Specifically, all the Blood elders were united in their unshaken belief that it had been the desire of Red Crow to safeguard all the land inhabited by the Bloods for the benefit of future generations. Elder Mary Louise Oka told the Commission:

> In fact, Red Crow was well known for his guardianship and stewardship responsibilities with respect to the land. He instilled upon his fellow leaders, fellow clan leaders and his successors in his leadership responsibilities, that prime and foremost in their responsibilities was to safeguard the land and never to give up nor sell the land. When he gave up his responsibilities as leader to his son Crop Eared Wolf, that was one of the first things that he told Crop Eared Wolf, Never sell your land. Safeguard as hard as you can this land that belongs to our people. No, Red Crow did not sell the land.[92]

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[90] ICC Transcript, December 2, 1997, vol. 2, p. 186 (Margaret Hind Man).

[91] ICC Transcript, December 2, 1997, vol. 2, pp. 204-05 (Louise Crop Eared Wolf).

[92] ICC Transcript, December 2, 1997, vol. 2, p.167 (Mary Louise Oka).

Many of the Blood elders echoed her view, adding that it was not a tradition of the Bloods to have important decisions, especially decisions concerning land, made unilaterally by the Chief. When elder Pete Standingalone was asked by Commission Counsel if Red Crow could have decided on his own to surrender the land, he replied: "No. Even though he is the Head Man, he cannot make a decision by himself."[93]

Elder Louise Crop Eared Wolf elaborated:

> Sometimes it took a long time to make decisions because one of the most precious ways of our people is to respect the ideas and input of other people. And that's still a tradition that we use. The leaders had to share, bring together first of all their leaders within their clan, and then other clan leaders. And these meetings would always begin with the sharing of tobacco, particularly if it was a very important decision. In these kind of meetings, there was no argument. They made sure that there was input by everybody, and then they all agreed. It was by consensus that this is what we will do with respect to this particular issue. That was how they made decisions in those days. No individual by themselves could not make decisions, particularly important decisions.[94]

Because of the necessity of consultation, it was assured that knowledge of a major decision affecting the tribe as a whole would be widespread among the Blood people. The elders were confident that they would have heard of an event as significant as a land surrender. When elder Irene Day Rider was asked by Commission Counsel whether the holding of surrender meeting would have been an unusual event in 1889, and would have become part of the tribe's oral history, she stated:

> Yes, it would have been common knowledge to all of the people in our community. That is the way of our people. The leaders would have to have consulted the individual members of their clans, and everybody would have known about this particular surrender or giving away of land.[95]

The elders also testified that the tribe had never received compensation from anyone for the land or for the use of the land. In their minds, however, compensation was not an issue, since they believed that the land had never been sold. According to the oral history of the Bloods, the occupant of the land, David Akers, was allowed to remain on the land because he lived with a

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[93] ICC Transcript, December 2, 1997, vol. 2, p. 151 (Pete Standingalone).
[94] ICC Transcript, December 2, 1997, vol. 2, pp. 196-97 (Louise Crop Eared Wolf).
[95] ICC Transcript, December 2, 1997, vol. 2, p. 217 (Irene Day Rider).

Blood woman as his wife, and there was a child of the union. The elders testified that the traditions of their people required that a son-in-law help support his wife's family,[96] but that there was no intention that he be given or sold land in return.[97] As a result, Akers's occupation of the land did not signify anything more than a normal family arrangement. In their minds the land had always been a part of the reserve and would always remain so.

To the Bloods, stewardship of the land was not only an historical obligation but is also an ongoing responsibility of the tribe. Elder Mary Stella Bare Shin Bone, who is a granddaughter of the late Chief Shot Both Sides and a former councillor of the Bloods, stated:

> I refer to many times the stories that my grandfather told me with respect to his responsibilities and our responsibilities as a people with respect to the land. He would often tell me, You are coming to an age where you are becoming a very mature individual. You will be called upon to take part in major decisions of our people. Never sell your land. Always safeguard your rights and your stewardship, particularly your stewardship rights over the land. Look around you, he would often tell me, at all the land that has been taken away from us. What little land that you don't have left. Never allow them to take that away, nor never give it away.[98]

In summary, the Blood people do not believe that a surrender meeting concerning the Akers land ever took place, because their oral tradition includes no mention of it. In their view, their land has a sacred significance, and any momentous decision concerning it would have to be made by consultation and with the consent of all of the clan leaders, thereby guaranteeing the event a place in the tribe's oral history. They can only conclude that Red Crow's mark on the surrender document, if genuine, was obtained by fraud.

The feelings of the Bloods for the land in question may be best expressed by the evocative words of elder Louise Crop Eared Wolf near the conclusion of her testimony:

> We cannot sell the land. Every day we pray to the land, we give offerings to the land, we take the land as our mother. How can we sell something as precious as land? I find it unbelievable that this land was sold or given away, because we do not sell land.[99]

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[96] ICC Transcript, October 22/23, 1997, vol. 1, p. 40 (Rosie Day Rider).
[97] ICC Transcript, October 22/23, 1997, vol. 1, p. 82 (Rosie Red Crow).
[98] ICC Transcript, December 2, 1997, vol. 2, p. 210 (Mary Stella Bare Shin Bone).
[99] ICC Transcript, December 2, 1997, vol. 2, p. 202 (Louise Crop Eared Wolf).

PART III

ISSUES

The claim submitted by the Blood Tribe / Kainaiwa to the Minister raises issues of whether the 1889 Akers surrender was valid and, if valid, whether the Crown violated its fiduciary duty to the First Nation to act in its best interests in dealing with the lands and underlying mining and mineral rights. The revised planning conference summary attempted to consolidate the parties' positions on the issues before the inquiry:

> First, if the Commission found that the surrender is valid the First Nation might be entitled to a settlement compensating for the loss of use of the money that should have been paid to the First Nation at the time of the surrender in 1889. Second, a finding that the surrender is valid but that the Crown had a statutory or fiduciary obligation to withhold the mineral rights for the use and benefit of the First Nation could result in a claim for compensation for loss of mineral use and their market value. Third, a finding that the surrender was invalid could result in a claim for compensation for the current, unimproved value of the claim lands, including the value of mines and minerals, and loss of use of the land from 1889 to present. Therefore, it is important to examine whether the Crown breached its statutory and fiduciary obligations in relation to the 1889 surrender and the mines and minerals in order to determine what heads of compensation the First Nation is entitled to negotiate, if any.[100]

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[100] Summary (revised as of September 16, 1997), Indian Claims Commission Planning Conference, Blood Tribe / Kainaiwa First Nation [Akers Surrender (1889)], Calgary, Alberta, August 1, 1997, pp. 5-6

PART IV

SUBMISSIONS

The 1996 Blood Tribe / Kainaiwa claim submission (reprinted as Appendix B) alleges that the 1889 Akers surrender was invalid, and that the Crown breached its obligations to the First Nation following the surrender. The following grounds were offered in support of these allegations:

(a) *surrender vote*: no valid surrender vote by the First Nation ever took place;

(b) *breach of Crown's fiduciary obligation*: following the purported surrender, the Crown failed "to deal with the mines and minerals in an appropriate way for the benefit of the Tribe."[101]

As a result, the First Nation asserts that compensation is owed to the First Nation of $753,379.18, excluding royalties stemming from any natural gas or petroleum also owing to the First Nation.[102]

SURRENDER VOTE

The 1996 Blood Tribe / Kainaiwa claim submission was, in fact, a supplemental submission to its original submission in 1995.[103] The 1995 submission included a lengthy historical study and legal argument, all of which is adopted in the 1996 Blood Tribe / Kainaiwa claim submission.[104] In particular, the First Nation submits that

> the Surrender is invalid. The Crown has certain legal obligations which must be met when the Crown proposes to initiate the formal surrender procedure. Furthermore,

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[101] Blood Tribe / Kainaiwa, Blood Tribe Supplemental Submission relating to the Akers Surrender, August 19, 1996, p. 2.

[102] Blood Tribe / Kainaiwa, Blood Tribe Supplemental Submission relating to the Akers Surrender, August 19, 1996, p. 11.

[103] See Introduction to this report. Blood Tribe / Kainaiwa, Specific Claim Submission: The Akers Surrender, April 1995 (ICC Exhibit 4).

[104] Blood Tribe / Kainaiwa, Blood Tribe Supplemental Submission relating to the Akers Surrender, August 19, 1996, p. 2.

> once the process is initiated, the Crown must follow the strict requirements of the *Indian Act* in taking the Surrender.[105]

The 1995 submission claims the surrender is invalid based on the following heads of relief: (1) fiduciary obligation, (2) breach of the *Indian Act*, (3) unconscionable bargain, (4) undue influence, (5) negligent misrepresentation, and (6) duress.[106]

The Supreme Court of Canada released its *Apsassin* decision, a major development in jurisprudence, after the Blood Tribe / Kainaiwa submitted its claim in 1995.[107] In *Apsassin*, Mr Justice Gonthier held for the Court that:

> I would be reluctant to give effect to this surrender variation if I thought that the Band's understanding of its terms had been inadequate, or if the conduct of the Crown had somehow tainted the dealings in a manner which made it unsafe to rely on the Band's understanding and intention.[108]

The First Nation submits that "the Akers Surrender falls squarely within Justice Gonthier's description of when a Surrender will be found to be unlawful." The 1996 submission goes on to state:

> The Crown had offered the land to Akers believing it was not part of the Blood Reserve when, in fact, it was Blood Reserve land. As a result, the Crown had to quickly obtain a surrender of that land to rectify its own blunder and furthermore consciously attempted to do so, and did so, at no cost to the Crown. It certainly offends against the validity of a Surrender if the Crown pursues the Surrender with the express goal of convincing the Tribe that their right to land should be relinquished without any compensation in return. Yet this is exactly what occurred in this situation.[109]

The First Nation cites two letters as evidence for this argument. The first was from Commissioner Hayter Reed on July 4, 1889, in which he requested additional instructions regarding compensation and the amount of land to be surrendered.[110] The second was from R. Sinclair, acting Deputy Superintendent General, on July 13, 1889, in which he responded, stating:

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[105] Blood Tribe / Kainaiwa, Blood Tribe Supplemental Submission relating to the Akers Surrender, Augus. 19, 1996, p. 2.

[106] Blood Tribe / Kainaiwa, Specific Claim Submission: The Akers Surrender, April 1995 (ICC Exhibit 4).

[107] *Blueberry River Indian Band v. Canada*, [1995] 4 SCR 344.

[108] *Blueberry River Indian Band v. Canada*, [1995] 4 SCR 344 at 362.

[109] Blood Tribe / Kainaiwa, Blood Tribe Supplemental Submission relating to the Akers Surrender, August 19, 1996, p. 3.

[110] Hayter Reed, Indian Commissioner, to L. Vankoughnet, Deputy Superintendent General of Indian Affairs, July 4, 1889 (ICC Documents, pp. 267-68).

> when taking the surrender you had better make the most favourable terms possible with the Indians, committing the Department as little as possible to any question of compensation, either in land or in any other way ... The Superintendent General doubts whether an equivalent in land could be given to the Indians in the immediate locality of the Reserve, and he considers that land at any distance from their Reserve would be comparatively valueless to them.[111]

The First Nation further argues that the Crown clearly subordinated the First Nation's interests to its own, citing the evidence discussed above. In summary, the 1996 submission states that "the Crown's actions and motives in taking the Surrender and the subsequent affidavit as well as the lack of a surrender vote tainted the dealings as discussed by Gonthier J. in *Apsassin*."[112]

FIDUCIARY OBLIGATION BREACHED

The First Nation also presents an alternative argument in both the 1995 and 1996 submissions. The First Nation submits that, even if the surrender was valid, the Crown violated its fiduciary obligation to the Blood Tribe / Kainaiwa to deal with the lands and the mines and minerals in the best interests of the First Nation. In particular, the Crown ought to have sold the coal in 1889 while retaining all remaining mines and minerals for the benefit of the Blood Tribe. In support of this position, the 1996 submission cites *Apsassin* for the proposition that the Crown had a fiduciary duty not to inadvertently give away a potentially valuable asset of the First Nation.[113] By failing to do so, the First Nation submits that the Crown breached its fiduciary obligation.[114]

Regarding the First Nation's submissions on *Apsassin*, no finding will be made by the Commission on this matter as the inquiry was concluded before completion. The Commission's position on *Apsassin* has been considered previously in its 1998 report on the Kahkewistahaw First Nation Treaty Land Entitlement Inquiry.[115]

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[111] R. Sinclair, Acting Deputy Superintendent General of Indian Affairs, to Hayter Reed, Indian Commissioner, July 13, 1889 (ICC Documents, p. 269).

[112] Blood Tribe / Kainaiwa, Blood Tribe Supplemental Submission relating to the Akers Surrender, August 19, 1996, p. 3.

[113] Blood Tribe / Kainaiwa, Blood Tribe Supplemental Submission relating to the Akers Surrender, August 19, 1996, pp. 6-7.

[114] Blood Tribe / Kainaiwa, Blood Tribe Supplemental Submission relating to the Akers Surrender, August 19, 1996, p. 11.

[115] ICC, *Inquiry into the Treaty Land Entitlement Claim of the Kahkewistahaw First Nation* (Ottawa, November 1996), reported (1998) 6 ICCP 21.

PART V

CONCLUSION

In December 1997, DIAND informed the parties that it had asked the Department of Justice to undertake a further review of the Kainaiwa Akers surrender of 1889. Accordingly, the Commission inquiry was held in abeyance until the Department of Justice rendered its opinion. As noted above, on April 15, 1998, Canada advised that the Blood Tribe / Kainaiwa's specific claim regarding the 1889 Akers surrender had been accepted for negotiation of a settlement. In particular, DIAND accepted that an outstanding lawful obligation existed with respect to the Akers surrender. This conclusion was "based on the premise that the full and informed consent of the adult, male members of the Tribe was not properly obtained, thereby rendering the September 2, 1889 surrender of 440 acres of legally invalid."

In light of Canada's offer to accept the Blood Tribe / Kainaiwa claim for negotiation under the Specific Claims Policy, further inquiry into this matter is no longer necessary. The Commission commends the parties for their cooperation regarding matters of substance and form throughout the proceedings. We affirm and encourage this spirit of justice and fairness during the negotiations for settlement, being ever mindful of both the passage of time since the events precipitating this inquiry, and those elders of Blood Tribe / Kainaiwa who await a just resolution to this matter.

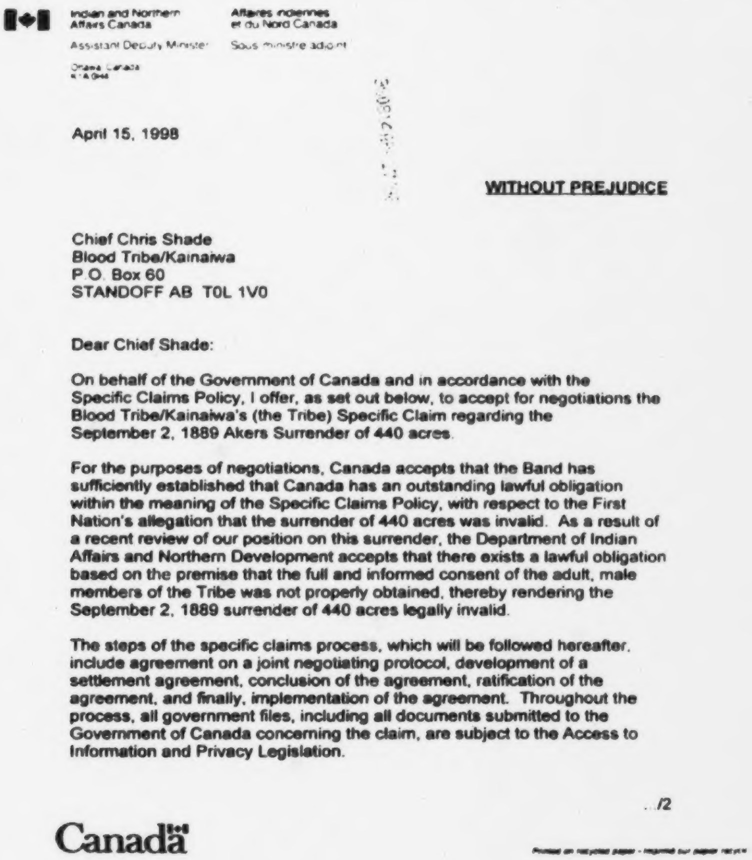
FOR THE INDIAN CLAIMS COMMISSION

Daniel J. Bellegarde Commission Co-Chair	P.E. James Prentice, QC Commission Co-Chair	Carole T. Corcoran Commissioner

Dated this 30th day of June, 1999.

APPENDIX A

GOVERNMENT OF CANADA'S OFFER TO ACCEPT CLAIM



Indian and Northern Affairs Canada
Affaires indiennes et du Nord Canada

Assistant Deputy Minister
Sous-ministre adjoint

Ottawa Canada
K1A 0H4

April 15, 1998

WITHOUT PREJUDICE

Chief Chris Shade
Blood Tribe/Kainaiwa
P.O. Box 60
STANDOFF AB T0L 1V0

Dear Chief Shade:

On behalf of the Government of Canada and in accordance with the Specific Claims Policy, I offer, as set out below, to accept for negotiations the Blood Tribe/Kainaiwa's (the Tribe) Specific Claim regarding the September 2, 1889 Akers Surrender of 440 acres.

For the purposes of negotiations, Canada accepts that the Band has sufficiently established that Canada has an outstanding lawful obligation within the meaning of the Specific Claims Policy, with respect to the First Nation's allegation that the surrender of 440 acres was invalid. As a result of a recent review of our position on this surrender, the Department of Indian Affairs and Northern Development accepts that there exists a lawful obligation based on the premise that the full and informed consent of the adult, male members of the Tribe was not properly obtained, thereby rendering the September 2, 1889 surrender of 440 acres legally invalid.

The steps of the specific claims process, which will be followed hereafter, include agreement on a joint negotiating protocol, development of a settlement agreement, conclusion of the agreement, ratification of the agreement, and finally, implementation of the agreement. Throughout the process, all government files, including all documents submitted to the Government of Canada concerning the claim, are subject to the Access to Information and Privacy Legislation.

.../2

Canada

All negotiations are conducted on a "without prejudice" basis. The acceptance of this claim for negotiation of a settlement is not to be interpreted as an admission of fact or liability by the Government of Canada. In the event that no settlement is reached and litigation ensues, the Government of Canada reserves the right to plead all defences available to it, including limitation periods, laches, and lack of admissible evidence.

The settlement of this claim will be in accordance with Canada's Specific Claims Policy, as explained in the booklet Outstanding Business. As for the elements of the claim accepted for negotiations, compensation will be based on Compensation Criteria 3 and 9. The value of the compensation will take into account all the relevant criteria. No individual criterion will be viewed in isolation. Compensation will be a global amount based on all applicable criteria.

It should be noted that 219 of the 440 acres were returned to the Tribe in 1970. More recently, negotiations on the matter of compensation were completed in 1996. As a result, these factors will be taken into account during any future negotiations on the 1889 Surrender. The settlement agreement between Canada and the Tribe dated November 7, 1996 provided for future negotiations on the matter of the validity of the surrender.

In the event that a final settlement is reached, Canada will require from the Tribe a final and formal release on every aspect of this claim, in order to ensure that the claim cannot be reopened. Canada would further stipulate that in order to obtain certainty with respect to the surrendered lands, an absolute present day surrender will be required as part of any prospective settlement of this claim. As part of the settlement, the Government of Canada will also require an indemnity from the Tribe.

I would like to thank the Tribal Elders and the members of the Tribe for their contributions to the Indian Claims Commission inquiry process. I look forward to a successful resolution of this matter.

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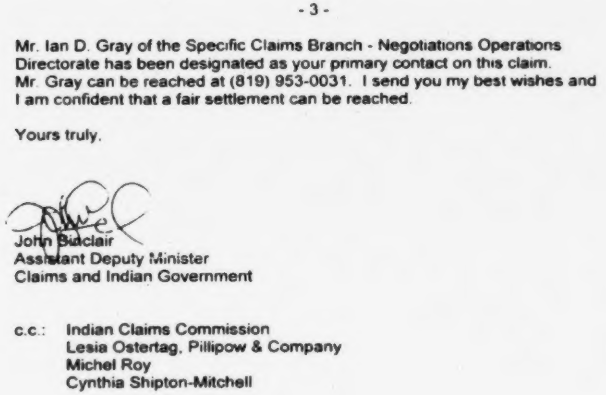


Mr. Ian D. Gray of the Specific Claims Branch - Negotiations Operations Directorate has been designated as your primary contact on this claim. Mr. Gray can be reached at (819) 953-0031. I send you my best wishes and I am confident that a fair settlement can be reached.

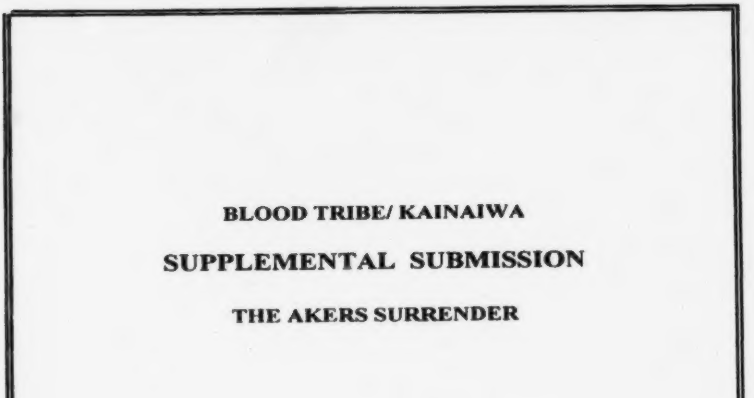
Yours truly,

John Sinclair
Assistant Deputy Minister
Claims and Indian Government

c.c.: Indian Claims Commission
Lesia Ostertag, Pillipow & Company
Michel Roy
Cynthia Shipton-Mitchell

APPENDIX B

1996 BLOOD TRIBE / KAINAIWA CLAIM SUPPLEMENTAL SUBMISSION



BLOOD TRIBE/ KAINAIWA

SUPPLEMENTAL SUBMISSION

THE AKERS SURRENDER

Submitted on behalf of the Tribe by:

Pillipow & Company
Barristers and Solicitors
102 - 500 Spadina Crescent East
Saskatoon, Saskatchewan
S7K 4H9

PHONE: (306) 665-3456
FAX: (306) 665-3411

Lawyers in Charge: William J. Pillipow
and Lesia S. Ostertag

August 19, 1996

SUPPLEMENTAL SUBMISSION

I. Background to Claim

In 1884 David Evan Akers requested 330 acres of land as homestead lands (which included some 225 acres of Blood Reserve land) from the federal government. The request sparked great confusion within the Department of Indian Affairs and the Department of the Interior as to whether the land requested by Akers was within the Blood Reserve or not. The Department of Indian Affairs in 1885 erroneously advised the Department of the Interior that the land was not included in the "Blood or any other reserve" and the lands were then promised to David Akers. In 1889, after the error was discovered, Indian Commissioner Reed was instructed to take a surrender from the Indians of the relevant lands in order to rectify the blunder and was specifically instructed "that when taking the surrender you had better make the most favourable terms possible with the Indians, committing the Department as little as possible to any question of compensation, either in land or any other way." A purported Surrender was taken on September 2, 1889 for 440 acres of land, 215 acres in excess of what Akers had been previously promised.

The affidavit to the Surrender was not marked until December 20, 1889. Before marking the document Head Chief Red Crow was informed that he could not refuse to make the affidavit since he had already marked two previous ones to correct errors, and that this affidavit was to correct another error. The Tribe is of the view that this affidavit was taken under highly suspicious circumstances.

On August 5, 1892 a patent was issued in the name of David E. Akers for 225 acres of the relevant lands and mines and minerals. By October, 1893, Akers' creditors had seized the subject land, yet the Department of Indian Affairs made no attempt to re-acquire the lands for the Tribe. Later that month there were discussions between the Department of Indian Affairs and the Department of the Interior for return of the Surrendered lands which were not patented to Akers, but no action was taken. It was not until April of 1930 that the 219 acres (more or less) of Surrendered land which was not patented to Akers was transferred from the Department of the Interior to the Department of Indian Affairs. No action was taken to return that 219 acres (more or less) to reserve status for the benefit of the Tribe until August of 1970. At no time did the Tribe receive compensation for the land or mines and minerals which were purportedly Surrendered on September 2, 1889.

At this time, the Tribe believes that there still are two issues outstanding. Firstly, the Tribe continues to question the validity of the Akers Surrender. Secondly, even if the Surrender was valid (which is denied) the Tribe believes that the Crown breached its fiduciary obligation owed to the Tribe following the purported surrender to deal with the mines and minerals in an appropriate way for the benefit of the Tribe.

II. Validity of the Surrender

The Tribe is strongly of the view that the Surrender is invalid and believe that a Court would agree with this position. The Crown has certain legal obligations which must be met when the Crown proposes to initiate the formal surrender procedure. Furthermore, once the process is initiated, the Crown must follow the strict requirements of the *Indian Act* in taking the Surrender. The legal arguments supporting this position were previously discussed in the original written Submission in support of this Claim. As well, the absence of a proper Surrender meeting and vote were thoroughly discussed in the original Submission and will not be reiterated in this Supplemental Submission.

In light of the Supreme Court of Canada decision of *Blueberry River Indian Band v. Canada*, [1996] 2 C.N.L.R. 25 (hereinafter "*Apsassin*"), specific elements of our original argument regarding the validity of the Surrender need to be emphasized. The *Apsassin* case involves a Treaty 8 First Nation with reserve lands in Northern British Columbia. In 1940 the First Nation surrendered the mineral rights on its reserve to the Crown for leasing. In 1945 (at the end of World War II), the First Nation consented to surrender the whole reserve to the Crown for "sale or lease". The land and minerals were then transferred to the Director of the *Veterans' Land Act* for soldier settlement purposes.

The Supreme Court of Canada agreed with the Federal Court of Appeal that no fiduciary duty was breached by the Crown on the facts of the case. As a result, the 1945 surrender was found to be valid. However, Gonthier, J. writing for the majority, noted at paragraph 14 as follows:

> I should also add that **I would be reluctant to give effect to this surrender** variation [the 1945 Surrender] **if I thought that the Band's understanding of its terms had been inadequate, or if the conduct of the Crown had somehow tainted the dealings in a manner which made it unsafe to rely on the Band's understanding and intention.**

The Akers Surrender falls squarely within Justice Gonthier's description of when a Surrender will be found to be unlawful. The Crown had offered the land to Akers believing it was not part of the Blood Reserve when, in fact, it was Blood Reserve land. As a result, the Crown had to quickly obtain a surrender of that land to rectify its own blunder and furthermore consciously attempted to do so, and did so, at no cost to the Crown. It certainly offends against the validity of a Surrender if the Crown pursues the Surrender with the express goal of convincing the Tribe that their right to land should be relinquished without any compensation in return. Yet this is exactly what occurred in this situation.

Evidence to this effect is found in two letters. In a request for further instructions in connection with the proposed Surrender, Indian Commissioner Reed writes:

> I have the honor to acknowledge the receipt of your letter of the 25th ultimo, authorizing me to ask the Blood Indians to surrender the land within their reserve, laid claim to by Mr. David E. Akers.
>
> ...
>
> **I will be glad moreover to be informed whether, in the event of the Indians which however I do not think probable requesting an equivalent in land, for the portion to be surrendered, I am at liberty to promise it, and if so, where it will be available, or again whether, if they ask for compensation of some other kind, I may grant it.**
>
> (Doc. No. 98)
> (emphasis added).

In reply, R. Sinclair, the Acting Deputy Superintendent General of Indian Affairs, writes on July 13, 1889 as follows:

> In beg to acknowledge the receipt of your letter of the 4th instant, No. 24,661, relative to the proposed surrender by the Blood Indians of land on their Reserve, claimed by David E. Akers.
>
> **In reply I have to inform you that when taking the surrender you had better make the most favourable terms possible with the Indians, committting the Department as little as possible to any question of compensation, either in land or in any other way.**

> The Superintendent General doubts whether an equivalent in land could be given to the Indians in the immediate locality of their Reserve, and he considers that land at any distance from their Reserve would be comparatively valueless to them. He will be glad, however, to learn what are the wishes of the Indians in this respect. It is hoped that your opinion that the Indians will not make any demand for an equivalent in land may prove to be correct.
>
> (Doc. No. 99)
> (emphasis added)

Clearly, the Crown never intended to discuss with the members that compensation should have been payable for the land either in cash or equivalent land. At the same time, the Crown was insisting that Akers would have to pay the Crown for the land (Docs. No. 6, 40). A position such as this is appalling and clearly falls within Gonthier's meaning of the term "tainted" dealings.

Furthermore, it is evident that the Crown was in fact turning to the Tribe to remedy their blunder in erroneously offering land to Akers that truly belonged to the Tribe. The Crown in taking the purported Surrender was clearly putting its interests ahead of those of the Tribe. This is highlighted by Deputy Superintendent General Vankoughnet's letter dated June 25, 1889 to Indian Commissioner Reed where he states:

> With reference to the subject matter of the correspondence contained in these papers, viz. Mr. David E. Akers' claim to land at the confluence of the St. Mary and Belly Rivers which forms part of the Blood Reserve, I have to refer you to my letter of the 24th Feb. 1887, and I **have to state that in view of all the circumstances the only course now to pursue would appear to be to ask the Indians to surrender the land in question with a view to Mr. Akers' title thereto being perfected, which, if you agree, you are hereby authorized to do and I enclose a printed form of surrender and affidavit to be used in connection therewith.** The proceeds in taking the Surrender should be conducted strictly in conformity with the provisions of the Indian Act.
>
> (Doc. No. 97)
> (emphasis added)

At no time did the Crown consider the interests of the Tribe. The Crown was more interested in finding a solution to an embarrassing problem which had nothing to do with the Tribe.

In addition, circumstances surrounding the swearing of the affidavit required by the *Indian Act* reveal calculated deception and fraud on the part of the Crown. The Surrender was purportedly taken on September 2, 1889; the affidavit was not signed until December 20, 1889. On January 8, 1890, the Indian Agent, W. Pocklington, reported to the Indian Commissioner in Regina as follows:

> I am pleased to report that I have at length succeeded in inducing "Red Crow" to make the affidavit before His Honour Judge Macleod releasing that portion of the Reserve claimed by W. D. Akers at Whoop-up on the 19th ult. I took "Red Crow" to Macleod and en route spoke to him on the question at last he told me that Mr. Akers had told "Day Chief" that he wanted the Indians to run him off the Reserve, no doubt with a view to making a claim against the Government for the same. **I told "Red Crow" he could not very well refuse to make the affidavit as he had already done so twice but unfortunately owing to an error in the survey, we wished him to make another.** He at least said that if Mr. Justice Macleod and I said it was right he would make the affidavit. I think I wrote to you from Macleod reporting this. I left the papers with His Honour who doubtless [eve?] this has forwarded it to you.
>
> (Doc. No. 107)
> (emphasis added)

Head Chief Red Crow was deceived into believing he was merely correcting a problem with the land exchange as opposed to giving up further land which was properly within the Reserve.

It is clear that the Crown's actions and motives in taking the Surrender and the subsequent affidavit as well as the lack of a surrender vote "tainted" the dealings as discussed by Gonthier J. in *Apsassin*. It is highly unlikely that the Tribe would have knowingly given up scarce Reserve land for no compensation. It is completely evident from the documentation that the Crown was turning to the Tribe to remedy a troubling and embarrassing problem of their own making. As a result, it would be unsafe to rely on the Tribe's understanding and intention with respect to the Surrender.

III. Mines and Minerals

Even if the Surrender is valid, (which is denied), it is the Tribe's position that the Crown should have dealt with the mines and minerals differently from how they did. Following the 1889 Surrender, the Crown became the fiduciary of the land and the mines and minerals and was to deal with both in the best interest of the Tribe. Given the historical evidence, that duty should have resulted in the Crown selling the coal in 1889 but retaining all remaining mines and minerals for the benefit of the Tribe over time.

The legal foundation for this position flows from the recent Supreme Court of Canada ruling in the *Apsassin* case. In that case, the land and minerals were transferred to the Director of the *Veterans' Land Act* for soldier settlement purposes following the purported surrender. The evidence in the case established that the minerals were transferred to the Director (and subsequently the veterans) for no added consideration. Natural gas of significant value was later discovered on these lands.

The majority decision found that the 1945 Surrender included both the surface and mines and minerals. They found that the 1945 Surrender subsumed the earlier 1940 Surrender of mines and minerals for leasing purposes and expanded upon it. Specifically, however, they found that with respect to the mineral rights that there was no clear authorization from the First Nation which justified the Department departing from its long-standing policy of reserving mineral rights when surface rights were sold.

Mr. Justice Gonthier states at pages 11-12 of his reasons as follows:

> In my view, it is critical to the outcome of this case that the 1945 agreement was a surrender in trust, to sell or lease. The terms of the trust agreement provided the DIA with the discretion to sell or lease, and since the DIA was under a fiduciary duty *vis-a-vis* the Band, it was required to exercise this discretion in the Band's best interests. Of equal importance is the fact that the 1945 surrender gave the DIA a virtual *carte blanche* to determine the terms upon which I.R. 172 would be sold or leased. The only limitation was that these terms had to be "conducive" to the "welfare" of the Band. Because of the scope of the discretion granted to the DIA, it would have been open to the DIA to sell the surface rights in I.R. 172 to the Director, *Veterans' Land Act* (DVLA), while continuing to

> lease the mineral rights for the benefit of the Band, as per the 1940 surrender agreement.
>
> Why this option was not chosen is a mystery. As my colleague McLachlin J. observes, the DIA had a long-standing policy, pre-dating the 1945 surrender, to reserve out mineral rights for the benefit of the aboriginal peoples when surrendered Indian lands were sold off. This policy was adopted precisely because reserving mineral rights were thought to be "conducive to the welfare" of aboriginal peoples in all cases. The existence and rationale of this policy (the wisdom of which, though obvious, is evidenced by the facts of this case) justifies the conclusion that the DIA was under a fiduciary duty to reserve, for the benefit of the Beaver Band, the mineral rights in I.R. 172 when it sold the surface rights to the DVLA in March 1948. In other words, the DIA should have continued to lease the mineral rights for the benefit of the Band as it had been doing since 1940. Its failure to do so can only be explained as "inadvertence".

The minority decision which did not differ in the end result just the route to get there, found that the 1945 Surrender did not include the mines and minerals because they were already subject to the 1940 Surrender for lease. They found that the 1940 Surrender for lease imposed a fiduciary duty on the Crown with respect to the mineral rights for leasing and that the Department breached this duty by conveying the rights to the Director of the *Veterans' Lands Act* in 1948.

The headnote of the case summarizes McLachlin's decision as follows:

> ... even if one were to assume that the 1945 surrender revoked the previous surrender of mineral rights, the 1945 surrender still imposed an obligation on the Crown to lease or sell in the best interests of the Band. A reasonable person does not inadvertently give away a potentially valuable asset which has already demonstrated earning potential. Nor does a reasonable person give away for no consideration what it will cost him nothing to keep and which may one day possess value, however remote the possibility. **The Crown managing its own affairs reserved out its minerals. It should have done the same for the Band. The duty on the Crown as fiduciary was that of a man of ordinary prudence in managing his own affairs.**

The unanimous result of all nine judges was that the minerals should have been retained and leased for the benefit of the First Nation.

This decision is clearly applicable to the Akers Claim. In *Apsassin,* the Supreme Court emphasizes the Crown's own policy of reserving mines and minerals as being important to their ultimate decision. Canada's own policy with respect to Crown land prior to the 1889 Surrender was to reserve the mines and minerals when issuing patents for land. The research done by Hugh Dempsey (copy attached) indicates that in 1887 an Order in Council was passed reserving all minerals for the Crown. Dempsey states, in part, "All patents from the Crown shall reserve to Her Majesty, Her Successors and Assigns forever, all mines and minerals which may be found to exist within, upon, or under such lands, together with full power to work the same". Mr. Dempsey continues in his report as follows (at p. 2):

> According to historian David Breen, "Henceforth, no lands were alienated without a clause in the patent specifically reserving mines and minerals to the Crown. This was a change of far-reaching consequence. At a stroke, Canada set upon a course of resource exploitation that differed significantly from that in the United States where typically land titles combined surface and subsurface rights. Nowhere is the longer-term consequence of this difference more apparent than in the development of the petroleum industry in western Canada."

This being Canada's policy at the time, the Crown should not have departed from it when acting as a fiduciary for the benefit of the Tribe.

Furthermore, if the Crown was going to offer the mines and minerals with the surface rights at a bare minimum, appropriate compensation should have been received. The minority judgment forcefully argues that the test is what a "man of ordinary prudence in managing his own affairs" would have done. Far from being a "remote possibility", Hugh Dempsey's report supports the fact that the value of petroleum and natural gas was known at the time and the existence of petroleum and natural gas in the area was well known by the 1889 Surrender. Dempsey reports on page 3 as follows:

> The Senate of Canada made an examination in 1887-88 of the "Great Mackenzie Basin," focusing on mineral and agricultural resources. This study was in part inspired by publicity relating to oil discoveries in the West and the belief that the Athabasca tar sands "were thought to be the surface manifestation of an underground pool of oil." In its final report in 1888, the Senate stated that "The evidence submitted to your Committee points to the existence in the Athabasca and Mackenzie Valleys of the most extensive petroleum field in America, if not in the World... it is probable this great petroleum field will assume an enormous value in the near future and will rank among the chief assets comprised in the Crown domain of the Dominion."

9

> In 1889, Robert McConnell, of the Geological Survey, made a further examination of the tar sands and indicated there were 6.5 cubic miles of bitumen in the region. He also recommended that drilling commence in the area to locate the pools of oil believed to be under the sands.
>
> Meanwhile, the Athabasca tar sands were receiving attention both from Canadian newspapers and oil specialists throughout the world...

Dempsey reports widespread publicity and interest in the discovery of oil in Alberta. Federal interest was even heightened to a point where they began separating surface and subsurface rights, reserving minerals and mines to the Crown. This clearly indicates that the Federal government recognized an economic value in mineral rights which made it worthwhile to reserve these rights for itself. Even the list of people filing oil claims in 1889 indicates the knowledge that the Federal government had with respect to the value of minerals in the area. Those filing oil claims in 1889 include:

⇒ John Herron, a staunch Conservative and elected Member of Parliament in 1904

⇒ A.R. Springett, a former Indian Agent on the Peigan Reserve

⇒ A.P. Patrick, Dominion Land Surveyor

⇒ A.A. McCullough and Alex McLennan, successful Pincher Creek ranchers

Furthermore, a number of newspapers carrying stories about the oil discoveries were owned by Members of Parliament and include:

⇒ *Regina Leader*, owned by Nicholas Flood Davin, Conservative Member of Parliament, 1887-1900

⇒ *Edmonton Bulletin*, owned by Frank Oliver, Member of the Legislative Assembly of the North-West Territory, 1888-96, and Liberal Minister of the Interior, 1905-11

⇒ *Calgary Herald*, partly owned by D.W. Davis, Conservative Member of Parliament for Fort Macleod

⇒ *Macleod Gazette*, strongly supported the Conservative party

The number of government employees aware of the oil discoveries in Alberta make it inconceivable that the Crown did not know of the discoveries or of the value of such discoveries. It is a virtual certainty that between the wide publicity and the personal knowledge of individuals, the Crown was well aware of the value and importance in mines and minerals.

The appraisal report prepared by Serecon Valuation and Agricultural Consulting Inc. for Public Works and Government Services Canada, entitled "Blood/Kainaiwa Tribe Specific Claim Appraisal of Surrendered Lands Within Township 8, Range 22, W4th" suggests that there would have been very limited oil and gas and coal production from this land, resulting in minimal or no economic return. However, the appraiser correctly notes that no geological studies support this opinion (at p. 39). Obviously, an opinion as to the existence or non-existence of certain mines or minerals is a highly technical matter and one that Mr. Simpson is not qualified to give.

Even if we accept Serecon's report, which we do not, the report fails to take into account the lost opportunity of leasing the land for exploration had the Crown retained ownership of the petroleum and natural gas rights for the benefit of the Tribe. McDaniel & Associates prepared a detailed report dated April 10, 1996, analyzing the revenue which the Blood Tribe would likely have received just from leasing the petroleum and natural gas rights to the lands between 1889 to January 1, 1996, had the Crown retained ownership of the petroleum and natural gas rights for the benefit of the Tribe.

The McDaniel & Associates report clearly illustrates that land adjacent to and contiguous with the land in question had been leased at different times since the purported surrender, and therefore it is highly reasonable that the land in question would have been leased at the same time for the purpose of exploration if the minerals had been retained for the benefit of the Tribe. McDaniel & Associates used only the lease payments of directly adjacent lands in arriving at their estimate of payments lost to the Tribe. It must be pointed out that land in the general area was leased at a much higher fee, yet the report used only lease payments of **directly adjacent lands**, resulting in a more conservative estimate.

On the basis of this analysis, McDaniel & Associates illustrate no fewer than nine leases directly adjacent to the land in question. The dates and value of these leases are listed below:

Date	Original Amount ($)	Value at 01-Jan-96 ($)
01-Mar-38	44.40	2,671.68
01-Sep-49	222.00	7,565.55
07-Jul-55	2,752.80	70,276.11
29-May-58	222.00	4,770.18
14-Sep-67	270.84	3,695.72
30-Aug-79	124,710.72	685,805.74
01-May-80	-8,085.00	- 39,829.21
27-Mar-90	2,960.59	4,872.33
24-Jan-94	12,423.12	14,551.09

This very conservative approach demonstrates compensation owing to the Tribe of $753,379.18. This, of course, does not include royalties stemming from any natural gas or petroleum which would have been exploited pursuant to these exploration leases.

As well, AFC Agra Services Ltd. values the gravel on these lands alone at $125,000.00. The Tribe is also currently studying the value of other mines and minerals on the subject land.

IV. Conclusion

The position of the Tribe is that following the 1889 Surrender, the Crown became the fiduciary of the mines and minerals (and the surface) and was to deal with those mines and minerals in the best interest of the Tribe. That duty, in our view, should have resulted in the Crown selling the coal in 1889 but retaining all remaining mines and minerals and leasing or developing the remaining mines and minerals for the benefit of the Tribe over time. This not being done, the Crown breached its fiduciary obligations to the Tribe.

All of which is submitted this 19th day of August, 1996 on behalf of the Blood Tribe.

PILLIPOW & COMPANY

Per: ______________________

APPENDIX C

BLOOD TRIBE / KAINAIWA 1889 AKERS SURRENDER INQUIRY

1	**Planning conference**	August 1, 1997
2	**Community sessions**	October 22 and 23, 1997 December 2, 1997

Two community sessions were held at Blood Reserve, Alberta. At the first, the Commission heard from the following witnesses: Wilton Good Striker, Rosie Day Rider, Rosie Red Crow, Adam Delaney, Ted Brave Rock.

Witnesses heard at the second session were: Pete Standingalone, Mary Louise Oka, Margaret Hind Man, Louise Crop Eared Wolf, Mary Stella Bare Shin Bone, Irene Day Rider.

3	**Canada's offer to negotiate**	April 15, 1998

INDIAN CLAIMS COMMISSION

DUNCAN'S FIRST NATION INQUIRY
1928 SURRENDER CLAIM

PANEL

Commission Co-Chair Daniel J. Bellegarde
Commission Co-Chair P.E. James Prentice, QC
Commissioner Carole T. Corcoran
Commissioner Roger J. Augustine

COUNSEL

For the Duncan's First Nation
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To the Indian Claims Commission
David E. Osborn, QC / Thomas A. Gould

SEPTEMBER 1999

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PART I

INTRODUCTION

BACKGROUND TO THE INQUIRY

This report addresses a claim submitted by the Duncan's First Nation[1] to the Government of Canada initially alleging that the surrenders of eight parcels of reserve land – Indian Reserves (IR) 151 and 151B to 151H – by the Band in 1928 were null and void. The First Nation claims that the surrenders were not obtained in strict compliance with the statutory requirements governing the surrender of reserve lands set out in section 51 of the 1927 *Indian Act.*[2]

On August 27, 1994, Allan Tallman, Senior Claims Advisor with Specific Claims West (SCW), Department of Indian Affairs and Northern Development (DIAND or the Department), wrote to the Chief and Council of the Duncan's First Nation to inform them of Canada's position regarding the claim:

> It is Canada's position that Duncan's Indian Band's claim submission has not established an outstanding lawful obligation on the part of Canada to the band, as outlined in the Specific Claims Policy booklet entitled: *"Outstanding Business"*. In arriving at our position, we have relied on the Specific Claims Policy, the evidence and materials provided to our office and, the historical report prepared on behalf of Specific Claims West. Furthermore, our position is preliminary in the sense that we will be prepared to discuss it with you, and we will review any further evidence or arguments that may be presented before a final position is taken by the Government of Canada.
>
> I should also point out that the band has the option to submit a rejected claim to the Indian Specific Claims Commission and request that the Commission hold an inquiry into the reasons for the objection.[3]

In light of Canada's position, Jerome Slavik, legal counsel acting on behalf of the Chief and Council of the Duncan's First Nation, wrote to the Indian Claims

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[1] Alternatively referred to as "Duncan's," the "First Nation," or the "Band," depending on the historical context. In earlier times the First Nation was also referred to as the Peace River Landing Band.

[2] *Indian Act*, RSC 1927, c. 98.

[3] Allan Tallman, Senior Claims Advisor, Specific Claims West, DIAND, to Chief and Counsel, Duncan's Indian Band, August 22, 1994, DIAND file BW 8260/AB451-C1 (ICC Documents, pp. 807-09).

Commission on October 7, 1994, to request an inquiry into the rejection of the claim:

> We have been instructed by Chief Irwin Knott and the Council of Duncan's Indian First Nation to request that the Indian Claims Commission conduct an inquiry into the rejection of the specific claim filed by their First Nation regarding the wrongful surrender of a number of their Reserves.
>
> ... In our view, this claim centres around the truthfulness and validity of the Indian version of events as opposed to the documented version of events maintained in the Department's archives. The rejection occurred because SCW did not believe testimony set out in the Affidavits of three elders who were familiar with the events and people surrounding this wrongful surrender.[4]

By letter dated October 28, 1994, the Indian Claims Commission (the Commission) informed the Specific Claims Branch of DIAND that, in accordance with the request submitted to the Commission by the Chief and Band Council of the Duncan's First Nation, the Commission had initiated an inquiry into the Minister's rejection of the claim.

It should be noted that this report does *not* deal with the First Nation's other two reserves – IR 151A and 151K – since the former reserve was never relinquished and the latter, although surrendered in 1928, never sold and was returned to the First Nation in 1965. Nor does this report deal with IR 151H. During the course of this inquiry, Director General Michel Roy of DIAND's Specific Claims Branch agreed to negotiate the First Nation's claim regarding IR 151H, acknowledging that the First Nation had established Canada's outstanding lawful obligation "arising from the alleged failure to comply with the requirements of the 1927 *Indian Act* when taking the 1928 surrender of Reserve 151H."[5] For this reason, the surrender of IR 151H has been withdrawn from our terms of reference, and we have addressed only the seven parcels referred to as IR 151 and 151B through 151G.

A summary of the written submissions, documentary evidence, transcripts, and the balance of the record in this inquiry is set forth in Appendix A of this report.

MANDATE OF THE COMMISSION

The mandate of this Commission is set out in federal Orders in Council providing the Commissioners with the authority to conduct public inquiries into specific claims and to issue reports on "whether a claimant has a valid claim for negotiation under the [Specific Claims] Policy where the claim was already rejected by the Minister."[6] This Policy, outlined in the Department's 1982 booklet entitled *Outstanding Business: A Native Claims Policy – Specific Claims*, states that Canada will accept claims for negotiation where they disclose an outstanding "lawful obligation" on the part of the federal government.[7] The term "lawful obligation" is defined in *Outstanding Business* as follows:

---

[4] Jerome N. Slavik, Ackroyd, Piasta, Roth & Day, to Daniel Bellegarde and James Prentice, Co-Chairs, Indian Claims Commission, October 7, 1994.

[5] Michel Roy, Director General, Specific Claims Branch, Indian and Northern Affairs Canada, to Donald Testawich, Chief, Duncan's First Nation, and Jerome Slavik, Ackroyd, Piasta, Roth & Day, January 31, 1997 (ICC Exhibit 11, p. 3).

> The government's policy on specific claims is that it will recognize claims by Indian bands which disclose an outstanding "lawful obligation," i.e., an obligation derived from the law on the part of the federal government.
>
> A lawful obligation may arise in any of the following circumstances:
>
> i) The non-fulfillment of a treaty or agreement between Indians and the Crown.
>
> ii) A breach of an obligation arising out of the *Indian Act* or other statutes pertaining to Indians and the regulations thereunder.
>
> iii) A breach of an obligation arising out of government administration of Indian funds or other assets.
>
> iv) An illegal disposition of Indian land.[8]

Furthermore, Canada is prepared to consider claims based on the following circumstances:

> i) Failure to provide compensation for reserve lands taken or damaged by the federal government or any of its agencies under authority.
>
> ii) Fraud in connection with the acquisition or disposition of Indian reserve land by employees or agents of the federal government, in cases where fraud can be clearly demonstrated.[9]

The Commission has been asked to inquire into and report on whether the Duncan's First Nation has a valid claim for negotiation pursuant to the Specific Claims Policy. This report contains our findings and recommendations on the merits of this claim.

---

[6] Commission issued September 1, 1992, pursuant to Order in Council PC 1992-1730, July 27, 1992, amending the Commission issued to Chief Commissioner Harry S. LaForme on August 12, 1991, pursuant to Order in Council PC 1991-1329, July 15, 1991.

[7] DIAND, *Outstanding Business: A Native Claims Policy – Specific Claims* (Ottawa: Minister of Supply and Services, 1982), 20; reprinted in (1994) 1 ICCP 171-85 (hereafter *Outstanding Business*).

[8] *Outstanding Business*, 20; reprinted in (1994) 1 ICCP 179.

[9] *Outstanding Business*, 20; reprinted in (1994) 1 ICCP 180.

PART II

HISTORICAL BACKGROUND

TREATY 8

The impetus for the Government of Canada to negotiate a treaty with the Indians inhabiting the territory north of Treaty 6 coincided with the rapid influx of prospectors en route to the Yukon goldfields during the final years of the 19th century.[10] The Indians inhabiting what is now northern Alberta became concerned that their rights were being jeopardized by the movement of non-aboriginal peoples into these lands, and their response was to seek the protection of a formal treaty.[11] For its part, the Government of Canada was willing to negotiate a treaty, since such an agreement would facilitate the movement of settlers into this region. Therefore, in 1898, the Superintendent General of Indian Affairs recommended to the Governor in Council that a treaty be concluded to minimize the potential for conflict between newcomers and the Indian inhabitants of the territory north of the Treaty 6 boundary.[12] Order in Council PC 2749, which authorized the establishment of a commission to negotiate this treaty, offers the following description of the historical context in which these discussions proceeded:

> On a report dated 30th November, 1898, from the Superintendent General of Indian Affairs ... it was set forth that the Commissioner of the North West Mounted Police had pointed out the desirability of steps being taken for the making of a treaty with the Indians occupying the proposed line of route from Edmonton to Pelly River; that he had intimated that these Indians, as well as the Beaver Indians of the Peace and Nelson Rivers, and the Sicamas and Nihames Indians, were inclined to be turbulent and were liable to give trouble to isolated parties of miners or traders who might be

---

[10] D. Madill, ***Treaty Research Report: Treaty Eight*** (Ottawa: DIAND, Treaties & Historical Research Centre, 1986), vii.

[11] Pressure for treaty had been exerted as early as 1890, when Kinoosayo, Chief of the Lesser Slave Lake Indians, presented a formal request to the Department of Indian Affairs. See D. Madill, ***Treaty Research Report: Treaty Eight***(Ottawa: DIAND, Treaties & Historical Research Centre, 1986), 5.

[12] Order in Council PC 2749, in ***Treaty No. 8, Made June 21, 1899, and Adhesions, Reports, Etc.*** (1899; reprinted Ottawa: Queen's Printer, 1966), 3-4 (ICC Documents, pp. 4-5).

> regarded by the Indians as interfering with what they considered their vested rights; and that he had stated that the situation was made more difficult by the presence of the numerous travellers who had come into the country and were scattered at various points between Lesser Slave Lake and Peace River.[13]

The Treaty Commission created by this Order in Council was sent into the Territory of Assiniboia to conduct negotiations and, on June 21, 1899, Treaty 8 was concluded with the Indians of Lesser Slave Lake.[14] The Treaty Commissioners – David Laird, J.H. Ross, and J.A.J. McKenna – then split up in an effort to meet with a number of groups of Indian people in the Treaty 8 area. Commissioners Ross and McKenna proceeded on towards Fort St John, British Columbia, while Commission Chairman Laird travelled to Peace River Landing (now Peace River) and Vermilion before turning his attentions to the northeast towards Lake Athabasca and the Slave River district.[15]

Laird met with the "Indians of Peace River Landing and the adjacent territory" on July 1, 1899, at which time Duncan Testawits, "Headman of Crees,"[16] signed an adhesion to Treaty 8 on behalf of his people.[17] This adhesion guaranteed that band members were entitled to the provisions of treaty, including the allocation of reserve lands in common or, for those who wished, in severalty:

> And Her Majesty the Queen hereby agrees and undertakes to lay aside reserves for such bands as desire reserves, the same not to exceed in all one square mile for each family of five for such number of families as may elect to reside on reserves, or in that proportion for larger or smaller families; and for such families or individual Indians as may prefer to live apart from band reserves, Her Majesty undertakes to provide land in severalty to the extent of 160 acres to each Indian, the land to be conveyed with a proviso as to non-alienation without the consent of the Governor General in Council of Canada, the selection of such reserves, and lands in severalty, to be made in the manner following, namely, the Superintendent General of Indian Affairs shall depute and send a suitable person to determine and set apart such reserves and

---

[13] Order in Council PC 2749, in *Treaty No. 8, Made June 21, 1899, and Adhesions, Reports, Etc.* (1899; reprinted Ottawa: Queen's Printer, 1966), 3 (ICC Documents, p. 4).

[14] *Treaty No. 8, Made June 21, 1899, and Adhesions, Reports, Etc.* (1899; reprinted Ottawa: Queen's Printer, 1966), 15 (ICC Documents, p. 1).

[15] *Treaty No. 8, Made June 21, 1899, and Adhesions, Reports, Etc.* (1899; reprinted Ottawa: Queen's Printer, 1966), 7-8 (ICC Documents, pp. 8-9).

[16] The treaty actually refers to Duncan Testawits as "Duncan Tastaoosts." Government officials have spelled the surname "Tastaoosts" a number of ways over the years, including "Tustawits," "Tustowitz," and "Testawich." The spelling that appears to have been used most commonly historically – and which the Commission has adopted for the purposes of this report – is "Testawits."

[17] *Treaty No. 8, Made June 21, 1899, and Adhesions, Reports, Etc.* (1899; reprinted Ottawa: Queen's Printer, 1966), 15 (ICC Documents, pp. 2 and 16).

> lands, after consulting with the Indians concerned as to the locality which may be found suitable and open for selection.[18]

One of the primary concerns of the Indians involved in the Treaty 8 negotiations concerned fears that "the making of the treaty would be followed by the curtailment of the hunting and fishing privileges" formerly enjoyed by the various bands.[19] Laird and his colleagues, however, calmed these fears by explaining that the treaty actually protected the right of Indians to pursue their traditional way of life:

> We pointed out that the Government could not undertake to maintain Indians in idleness; that the same means of earning a livelihood would continue after the treaty as existed before it, and that the Indians would be expected to make use of them....
>
> Our chief difficulty was the apprehension that the hunting and fishing privileges were to be curtailed. The provision in the treaty under which ammunition and twine is to be furnished went far in the direction of quieting the fears of the Indians, for they admitted that it would be unreasonable to furnish the means of hunting and fishing if laws were to be enacted which would make hunting and fishing so restricted as to render it impossible to make a livelihood by such pursuits. But over and above the provision, we had to solemnly assure them that only such laws as to hunting and fishing as were in the interest of the Indians and were found necessary in order to protect the fish and fur-bearing animals would be made, and that they would be as free to hunt and fish after the treaty as they would be if they never entered into it.[20]

Upon concluding his duties in the Peace River District, Laird assured the Indians that the government did not intend to survey reserve lands in the immediate future:

> As the extent of country treated for made it impossible to define reserves or holdings, and as the Indians were not prepared to make selections, we confined ourselves to an undertaking to have reserves and holdings set apart in the future, and the Indians were satisfied with the promise that this would be done when required. There is no immediate necessity for the general laying out of reserves or the allotting of land. It will be quite time enough to do this as advancing settlement makes necessary the surveying of the land.[21]

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[18] *Treaty No. 8, Made June 21, 1899, and Adhesions, Reports, Etc.* (1899; reprinted Ottawa: Queen's Printer, 1966), 12-13 (ICC Documents, pp. 13-14).

[19] *Treaty No. 8, Made June 21, 1899, and Adhesions, Reports, Etc.* (1899; reprinted Ottawa: Queen's Printer, 1966), 5 (ICC Documents, p. 6).

[20] *Treaty No. 8, Made June 21, 1899, and Adhesions, Reports, Etc.* (1899; reprinted Ottawa: Queen's Printer, 1966), 5-6 (ICC Documents, pp. 6-7).

[21] *Treaty No. 8, Made June 21, 1899, and Adhesions, Reports, Etc.* (1899; reprinted Ottawa: Queen's Printer, 1966), 7 (ICC Documents, p. 8).

Reserves as such were not established for the use and benefit of the Duncan's Band until 1905.

SELECTION AND SURVEY OF RESERVES FOR THE DUNCAN'S BAND

In the years following the signing of Treaty 8, the extent of non-aboriginal migration into the Peace River District increased markedly. Although located 450 km northwest of Edmonton, Alberta, the Peace River District offered settlers soil and climatic conditions suitable for commercial wheat production. By the summer of 1928, the available Crown lands in the region had been practically exhausted.[22] By the end of 1931, over 400,000 acres of improved land in the district were devoted to producing agricultural crops – approximately 70 per cent in wheat alone – with an annual capacity of between 16 and 20 bushels per acre.[23]

In 1900, G.D. Butler, the sergeant in command of the North-West Mounted Police (NWMP) detachment at Peace River Crossing, assisted the Indians of the Duncan's Band to identify and stake out several parcels of land then occupied by band members and their families. Four individual parcels on the north bank of the Peace River near the Shaftesbury Settlement were identified as the holdings of specified individuals. As well, two substantial parcels, located to the northwest of the river lots and intended for use as haylands, were identified and staked. All the parcels were marked as "temporary" Indian reserves by Sergeant Butler.[24] With soil and climatic conditions well suited for crop production, the lands located on the flats of the Peace River near the Shaftesbury Settlement were as attractive to members of the Duncan's Band as they were to incoming settlers. As a result, it was not long before competing interests created difficulties between these two communities.

In 1903, for instance, Butler assisted Duncan Testawits and band member Xavier Mooswah in evicting a group of squatters from the area that Butler and the Band had previously identified as temporary Indian reserve land.[25]

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[22] J.W. Martin, Acting Commissioner, Dominion Lands Administration, Department of the Interior, to R.A. Bunyan, Waskatenau, Alberta, May 15, 1928, National Archives of Canada (hereafter NA), RG 10, vol. 7544, file 29131-9, pt 1 (ICC Exhibit 15, vol. 2).

[23] D. Kerr and D.W. Holdsworth, eds., *Historical Atlas of Canada*, vol. 3: *Addressing the Twentieth Century, 1891-1961* (Toronto: University of Toronto Press, 1990), plates 17, 18, and 43.

[24] G.D. Butler, North-West Mounted Police (NWMP), to David Laird, Indian Commissioner, November 2, 1900, NA, RG 10, vol. 7777, file 27131-1, as cited in G.N. Reddekopp, "The Creation and Surrender of the Beaver and Duncan's Band's Reserves," p. 24, note 123 (ICC Exhibit 5).

[25] Peace River Landing Department, NWMP, Quarterly Report, October 1, 1903, NA, RG 18, vol. 1575, file 125, as cited in G.N. Reddekopp, "The Creation and Surrender of the Beaver and Duncan's Band's Reserves," p. 26, note 131 (ICC Exhibit 5).

Subsequently, in July 1904, Butler filed a report with Commissioner Laird in which he outlined the deterioration of relations between Indians and settlers and requested that the Band's reserves be established by a government surveyor as soon as possible:

> I have the honor to report that the Peace River Band of Indians are claiming more land than they are entitled to, and if their Reserve is not surveyed soon there will be trouble between the Indians and settlers. A white man wants to settle on a good location when the Headman or one of his Band come and lay a complaint against him for trespass which means a three day patrol for us and swimming horses twice across the Peace River, which you yourself know is no joke. Three years ago I was in receipt of a letter from you stating that surveyors would be here during the Summer, but they did not get here. If you could possibly get it done this Summer it would simplify matters and be better than at present, when we should have a boundary and not an imaginary line which can be stretched by the Indians moving a stake.[26]

The timing of the request made it impossible to organize a survey for that year. In September 1904, the Department of Indian Affairs notified the Department of the Interior that a survey crew would be sent to the Peace River District during the summer of 1905 to set aside reserves for the Band.[27]

The following spring, J. Lestock Reid, a dominion land surveyor employed by the Department of Indian Affairs, travelled to the Peace Country to undertake the necessary survey. According to his year-end report, Reid and his survey team arrived at Peace River Landing on March 18, 1905, and commenced the survey work in early April:

> Finding that Duncan, with some of his band, was away on a hunting expedition to the north, I sent a man with dog train to notify him that I had arrived to lay out his reservation.
>
> While waiting, I made a traverse of the north bank of the river (Peace) between the English mission and the Big Island flat, as this was said to take in several Indian locations....
>
> My teams returned with the wagons and supplies from the Lesser Slave lake on March 29, and the headman, Duncan Testawits, returned on the following Saturday evening.

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[26] Sergeant G.D. Butler, NWMP, Peace River Landing, to D. Laird, Indian Commissioner, July 28, 1904, DIAND file 777/30-7-151A, vol. 1 (ICC Documents, p. 28).

[27] J.D. McLean, Secretary, Department of Indian Affairs (DIA), to P.G. Keyes, Secretary, Department of the Interior, September 3, 1904, DIAND file 777/30-7-151A, vol. 1 (ICC Documents, p. 30).

> I met with the headman and the Indians of the Peace River band on April 2, and after the usual talk with delays and adjustments, I at last succeeded in making the allotments I think satisfactory to them, and I hope the same will meet your approval.[28]

According to Reid's report, 10 reserves were created for the use and benefit of the Duncan's Band, and their total acreage coincided with the Band's treaty land entitlement, based on membership figures available on the date of first survey.[29] The Commission makes no findings, however, on whether the Duncan's Band has an outstanding entitlement to land under the terms of Treaty 8.

Six reserves (IR 151B to 151G) were located along the northwest bank of the Peace River in the vicinity of an area referred to locally as the Shaftesbury Settlement. They were intended to accommodate the previously established holdings of individual band members and their families. Since some band members had resided on these lands for a number of years, the creation of several small reserves allowed individuals to retain their original outbuildings, houses, and agricultural improvements.[30] Reid also surveyed two larger communal reserves (IR 151 and 151A) adjacent to the present-day villages of Berwyn and Brownvale, respectively,[31] which would provide the Duncan's Band with ample haylands.[32] Finally, before completing his work in the Peace River District, Reid portioned out two additional parcels of land for members who had requested land separate from the rest of the Band. Louison Cardinal received land on the northeast shore of Bear Lake (IR 151H), while William McKenzie chose land along the trail to Grouard, Alberta, 40 km south of Peace River Landing (IR 151K).[33]

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[28] J.L. Reid, Dominion Land Surveyor (DLS), to Frank Pedley, Deputy Superintendent General of Indian Affairs (DSGIA), January 15, 1906, "Report on Surveys in Treaty No. 8," Department of Indian Affairs, *Annual Report for the Year Ended June 30, 1906*, 161 (ICC Documents, p. 78).

[29] D. Robertson, Chief Surveyor, DIA, to D.C. Scott, DSGIA, January 5, 1923, DIAND file 777/30-8, vol. 1 (ICC Documents, p. 142): "These reserves are located in two main parcels – No. 151 and 151-A, and eight small scattered parcels Nos. 151-B, 151-C, 151-D, 151-E, 151-F, 151-G, 151-H and 151-K.... [T]he total acreage of all the reserves is equivalent to the total acreage to which this band would be entitled under the terms of Treaty, according to their population at the time of allotment."

[30] J.L. Reid, DLS, "Field Notes of Survey of Reservations for Peace River Landing Band of Indians," DIAND file 777/30-8, vol. 1 (ICC Documents, pp. 42-76).

[31] Duncan's IR 151A near Brownvale was also referred to as the "Old Wives Lake Reserve" because of its proximity to the lake of the same name.

[32] J.L. Reid, DLS, to Frank Pedley, DSGIA, April 25, 1905, DIAND file 777/30-8, vol. 1, as cited in G.N. Reddekopp, "The Creation and Surrender of the Beaver and Duncan's Band's Reserves," p. 28, note 143, and p. 31, note 161 (ICC Exhibit 5).

[33] J.L. Reid, DLS, to Frank Pedley, DSGIA, January 15, 1906, NA, RG 10, vol. 4005, file 24005-3, as cited by G.N. Reddekopp, "The Creation and Surrender of the Beaver and Duncan's Band's Reserves," p. 32, note 161 (ICC Exhibit 5).

Order in Council PC 917, dated May 3, 1907, confirmed IR 151 and 151A to 151G as having been "withdrawn from the operation of the Dominion Lands Act." IR 151H and 151K, although surveyed in 1905, were not confirmed by this instrument.[34] These reserves were confirmed on June 23, 1925, by Order in Council PC 990.[35] Table 1 and the claim area map on page 69 show the various Indian reserves surveyed and set apart for the use and benefit of the Duncan's Band.

TABLE 1

Duncan's Band Reserves

IR	Original Occupant	Acreage
151	Duncan's Band	3520.0
151A	Duncan's Band	5120.0
151B	J.F. Testawits	294.3
151C	Xavier Mooswah	126.6
151D	Alinkwoonay	91.6
151	Duncan Testawits	118.7
151F	David Testawits	134.0
151G	Gillaume Bell	5.7
151H	Louison Cardinal	160.0
151K	Wm. McKenzie	960.0
Total		10530.9

ECONOMY OF THE DUNCAN'S BAND TO 1928

In 1899, when the Duncan's Band adhered to Treaty 8, its members were predominantly hunters and trappers. One of the few exceptions was headman Duncan Testawits, who had settled on land near the Shaftesbury Settlement before taking treaty.[36] By 1908, H.A. Conroy, Inspector for Treaty 8, stated that band members were "very progressive and they are doing well. They have broken considerable land and fenced it. Some have built very good houses, have some horses and cattle and have made good progress in garden

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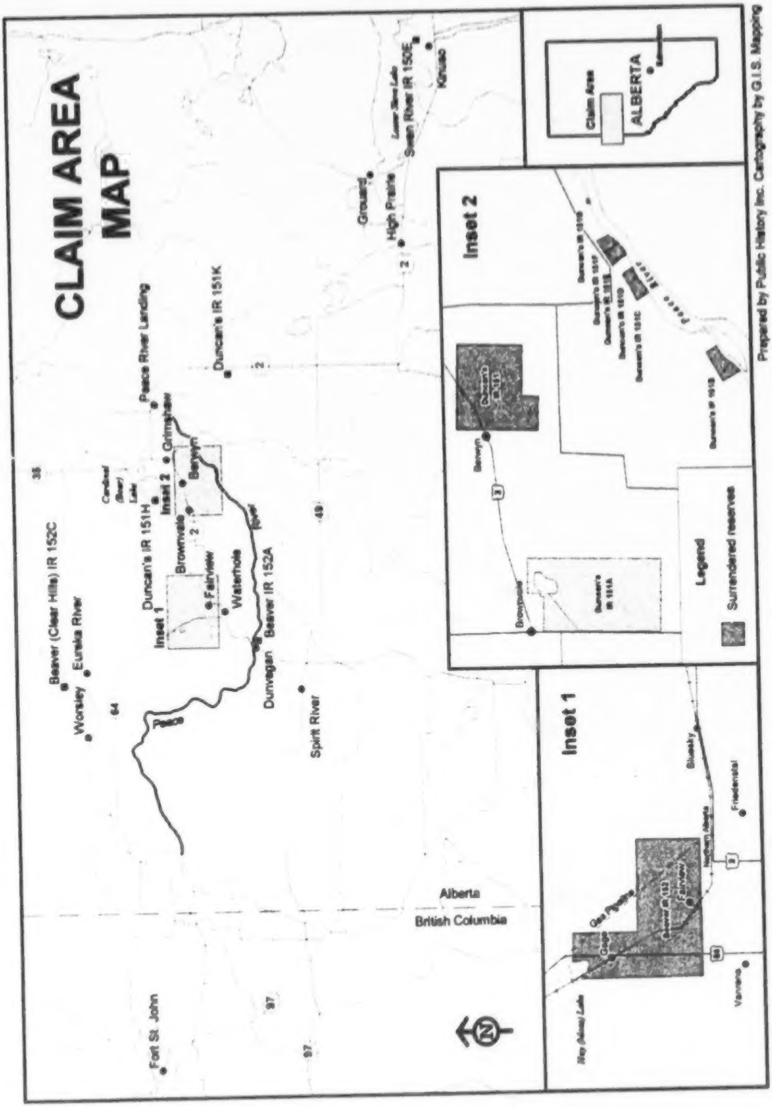
[34] Order in Council PC 917, May 3, 1907 (ICC Documents, p. 88).

[35] Order in Council PC 990, June 23, 1925 (ICC Documents, p. 172).

[36] Peace River Research Project, Interview with Mrs Henry Callahoo (Lucie Testawits), June 1956, Glenbow-Alberta Institute Archives, acc. no. M4560, file 36, as cited in G.N. Reddekopp, "The Creation and Surrender of the Beaver and Duncan's Band's Reserves," p. 23 (ICC Exhibit 5).


CLAIM AREA MAP
Beaver (Clear Hills) IR 152C
Eureka River
Worsley
Peace River Landing
Duncan's IR 151K
Grimshaw
Berwyn
Inset 2
Cardinal (Bear) Lake
Brownvale
Duncan's IR 151H
Inset 1
Fairview
Waterhole
Beaver IR 152A
Dunvegan
Spirit River
Peace
Alberta
British Columbia
Fort St. John
Grouard
High Prairie
Lesser Slave Lake
Swan River IR 150E
Kinuso
Inset 2
Inset 1
Gas Pipeline
Legend
Surrendered reserves
Claim Area
ALBERTA

Prepared by Public History Inc. Cartography by G.I.S. Mapping work."[37] Conroy's report, unfortunately, does not establish whether the members of the Duncan's Band were, at this time, pursuing commercial agriculture. Based on the comment regarding "progress in garden work," however, it is more likely that hunting and trapping still constituted their main livelihood, while garden farming provided an additional food source to be pursued during the months when traplines were not being maintained or hunts being arranged.

Inspector Conroy's year-end report for 1909 provides a much better basis for assessing the economic base of the Duncan's Band:

> Fifty miles down the Peace River, at what is known as the Duncan Reserve, there is a small band without a chief, but with two headmen. These headmen for the last few years have paid some attention to crop-growing, such as wheat, oats, potatoes, and for some few years have been quite successful; but like all Indians, they are easily discouraged. The drought and wind-storms destroy some of their crops, discouraging them greatly, so that some of them have not taken the same interest as they used to do; but I have tried to encourage them to continue in the work. They have a few cattle of their own, and a fairly good class of horse, but rather small for farming. I think that when they get a farm instructor on this reserve they will become self-supporting. Duncan, the headman, has a very good house and outbuildings. I find it difficult to interest them in their work, as for the least excuse they leave it and go off on a hunt. When they return, they find that their stock has broken into and destroyed a great portion of their crop. If the department had a good practical man to look after these two reserves, Dunvegan and Peace River, I think it would not be long before they would become self-supporting.[38]

The Department of Indian Affairs did not, however, heed Conroy's recommendation to provide the Lesser Slave Lake Agency with a farming instructor at that time.

The agricultural development of the Duncan's Band reserves declined in the years that followed. Two of the Band's more progressive agriculturalists, Duncan Testawits and David Testawits, died during the influenza epidemic of 1918. Paylists reveal that nine of the 68 Duncan's Band members listed on the paylist of 1918 (13.2 per cent of the population) died between the summer of 1918 and the summer of 1919.[39] It is probable that the loss of these nine individuals, including headman Duncan Testawits, coincided with a general abandonment of farming by the Band. Although the historical record on this issue is scanty, some information is found in correspondence between J.B. Early, a farmer with land adjacent to IR 151E (which had been set apart for Duncan Testawits), and representatives of the Department of Indian Affairs. In a letter dated January 12, 1923, Early noted that 75 acres of this reserve, known locally as the "Duncan Ranch," had been ploughed and cultivated as little as five years previously. However, he added that, by 1923, the farm was no longer being operated and had fallen into a state of disrepair:

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[37] H.A. Conroy, Inspector for Treaty 8, to F. Pedley, DSGIA, December 7, 1906, Department of Indian Affairs, *Annual Report for the Year Ended March 31, 1907*, 181.

[38] H.A. Conroy, Inspector for Treaty 8, to F. Pedley, DSGIA, February 19, 1909, Department of Indian Affairs, *Annual Report for the Year Ended March 31, 1909*, 199.

[39] Duncan's Band Annuity Paylist, June 28,1919, Genealogical Research Unit, DIAND, as cited in G.N. Reddekopp, "The Creation and Surrender of the Beaver and Duncan's Band's Reserves," p. 58 (ICC Exhibit 5).

> Five years ago when I lived on the Carson place, the old Chief was here on the place. They had cattle, horses, hogs, chickens and farm implements. Where the tools and implements have gone to I do not know. Of course the old Chief and many of the family is dead, and the rest seem to have no interest in operating the place. Still they refuse to sell this river home ranch.[40]

It would appear that farming on the reserve originally laid out for Duncan Testawits and his family did not continue after 1918.

A similar situation arose on IR 151G, which had originally been surveyed for Gillaume or "Gillian" Bell. In 1922, after the Department was informed that a local settler had inadvertently encroached on these lands after claiming an adjacent parcel, Acting Indian Agent Harold Laird – the son of former Commissioner David Laird – was instructed to visit the scene and report to the Department. In a letter dated October 31, 1922, he observed:

> The Indian Reserve, No. 151 G., mentioned in the Agent's letter, was surveyed for Gillian Bell, one of Duncan Tustawits' Band, who died in 1913. His widow married a Halfbreed named LaPretre and received a cheque for commutation on June 29, 1915. Since the latter date no one has lived on this land and the old buildings have fallen down and been burned.[41]

As was the case with the original Duncan Testawits farm, no farming or gardening had taken place on this reserve since the death of its original occupant.

Few other contemporary records exist. The detailed agency reports on individual bands, formerly included within the Department's *Annual Report*, were discontinued after 1916, and for this reason it is not possible to provide a more detailed portrayal of the Band's economic pursuits during this period. However, comments made by Agent Laird within his yearly reports concerning treaty annuity payments to the Duncan's Band appear to verify that the Band relied primarily on trapping at the time of surrender. On November 22, 1927, for instance, Laird reported that "[n]either the Indians of Dunvegan or Duncan's Band did very well hunting and trapping last season; both fur-bearing animals and moose being scarce."[42] He included similar comments in his report the following year:

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[40] J.B. Early, Peace River, to Harold Laird, Indian Agent, January 12, 1923, DIAND file 777/30-8, vol. 1 (ICC Documents, p. 149).

[41] H. Laird, Acting Indian Agent, to the Assistant Deputy and Secretary, DIA, October 31, 1922, DIAND file 777/30-8, vol. 1 (ICC Documents, p. 135).

> The fur catch through[ou]t the Agency in the season 1927-1928 was the smallest and lowest in value on record and, as the Indians in the out-lying district depend almost entirely upon the proceeds of the sale of fur-bearing animal pelts to provide themselves with clothing and other necessities, this was the cause of considerable suffering and will cause hardship this coming winter as there does [not] seem any reason to expect any increase in the fur yield.[43]

Similarly, the evidence of elder John Testawits indicates that trapping was the predominant livelihood of band members during this period. While providing a lengthy description of migration patterns during the trapping season, Testawits stated at the September 1995 community session that the Band followed a traditional way of life: "[T]hat's how they make their living in them days, was hunting or trapping. That's the only thing that was going on then."[44] Based on the correspondence concerning the abandonment of IR 151E and 151G, the foregoing agricultural statistics, Laird's annual reports, and the recollections of John Testawits, it would appear that, at the time of the surrenders in 1928, the members of the Duncan's Band sustained themselves through hunting and trapping, while cultivating gardens on a small scale. Therefore, it is improbable that the Band was farming its reserve lands commercially at the time of surrender.

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[42] Harold Laird, Indian Agent, to D.C. Scott, November 22, 1927, p. 4 (ICC Exhibit 15, vol. 3).

[43] Harold Laird, Indian Agent, to Assistant Deputy and Secretary, DIA, December 4, 1928, p. 4 (ICC Exhibit 15, vol. 3).

[44] ICC Transcript, September 6, 1995, p. 34 (John Testawits). See also correspondence from Chief Surveyor Donald Robertson, DIA, who in 1923 recommended the surrender of IR 151G: "The matter of obtaining this surrender does not appear to be immediate and *it is improbable that the Agent could obtain the attendance of a sufficient number of the voting members of the band during the trapping season*." DIAND file 777/30-8, vol. 1 (ICC Documents, p. 145). Emphasis added.

PRESSURE ON THE LAND RESOURCE BASE OF THE PEACE RIVER DISTRICT

Competition for land in the vicinity of the Duncan's Band reserves predated the date of first survey. As previously noted, the records of the North-West Mounted Police detachment at Peace River Landing reveal that the police had cooperated with members of the Duncan's Band in removing squatters from lands previously identified as belonging to the Band.[45] On October 29, 1904, a group of eight settlers, in an effort to protect their own land holdings "on the N[orth] W[est] Bank of the Peace River about 15 miles S[outh] W[est] of Peace River Crossing" and to voice their concerns about lands occupied by the Duncan's Band, petitioned the Department of Indian Affairs:

> 1. That we wish to have our lands surveyed in the shape we occupy them.
> 2. That as Mr. Selby is surveying in our vicinity we fear that he may trespass and cut up our lands.
> 3. We understand that the Indian Commissioner has promised a survey of the Indian Reserve in our midst next summer. We desire to have our claims adjusted before that should be done.
> 4. Many of us being in possession of our present lands previous to the Indian Treaty here. Some being located here for nearly twenty years.
> 5. We therefore humbly request that Mr. Selby or some other Surveyor be authorized to survey our settlement before any trouble may arise.[46]

The Department responded in December, assuring these settlers that they "need have no fear as to [a surveyor] trespassing on or cutting up your holdings, as you suggest in your petition."[47] Nonetheless, this petition highlighted the competing interests of the Duncan's Band membership and local settlers,[48] and the Department decided to proceed with the proposed survey soon after.

Completion of the 1905 survey, however, did not eliminate local disputes over the availability of productive farm land. In 1906, for example, Alexander McKenzie Sr, a squatter with a claim to land adjacent to IR 151H, which had been surveyed for Louison Cardinal of the Duncan's Band, raised a series of concerns with the Department. The following excerpt from his petition to the Superintendent General of Indian Affairs illustrates the emotional nature of the dispute:

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[45] Peace River Landing Department (NWMP), Quarterly Report, October 1, 1903, NA, RG 18, vol. 1575, file 125, as cited in G.N. Reddekopp, "The Creation and Surrender of the Beaver and Duncan's Band's Reserves," p. 26 (ICC Exhibit 5).

[46] T.A. Brick, Alexander Grey, W.H. Carson, J. Knott Sr., J. Knott Jr., Henry McCalester, Rev. M. Johnston, and John Wright to the Minister of the Interior, October 29, 1904, DIAND file 777/30-7-151A (ICC Documents, pp. 32-33).

[47] Department of Indian Affairs to T.A. Brick, Shaftesbury Settlement, Peace River Crossing, December 14, 1904, DIAND file 777/30-7-151A, vol. 1 (ICC Documents, p. 34).

[48] Sergeant G.D. Butler, NWMP, to David Laird, Indian Commissioner, July 28, 1904, DIAND file 777/30-7-151A, vol. 1 (ICC Documents, p. 28).

> In the autumn of 1895 as a pioneer settler and before anyone, with the exception of the missionaries, had any cattle in these parts, I established a cattle ranch at the east end of Brass Lake situated about fifteen miles from here, erected two substantial byres, one horse stable and a dwelling house, besides a hay yard, and lived and kept my stock ... for four successive years, and during that period I was in the habit every summer of mowing all around the edge of the lake of an average width of 30 yards to a length of 2½ miles at most, together with two small lakes in the vicinity, besides cut out a good travelling waggon [sic] road from the edge of the prairie through the thick wood and bush to Brass Lake and another trail leading to and from the small lakes, the length of the two trails probably would be about twelve miles.
>
> Through force of circumstances, however, I had to leave the place temporarily vacant for some years. [A]fterwards in order to retain my claim I rented it out for two years, but on my returning to the place this summer with some stock I find that Messrs. Reid and Wilson who were sent out last summer by the Indian Department to survey out the Indian Reserves, had unknown to us surveyed out a piece of land adjoining to my claim to one Louison Cardenette [sic], a Treaty Indian, tho' really a half breed from Lac La Biche, taking in a considerable size piece of my hay grounds on the edge of Bears Lake to serve him.
>
> Said Louison Cardenelle now goes and lets this piece of hay ground over to another treaty Indian belonging to Duncan Testawit's band and himself sets to work and cuts hay in the prairie close by and outside of his reserve.
>
> I consider this action on the part of Messrs. Reid and Wilson unreasonable and unfair after our going to the trouble and expense of cutting out roads and building, and moreover it deprives us of our squatters rights and places us in an inferior position to an [I]ndian as well as it encroaches upon our power to do our business and claims in a measure that we are not fit to do it.
>
> So far the land has not been surveyed and in consequence we retain our holdings by squatters rights only.
>
> Louison Cardenette came here in the summer of 1894 on a visit to some of his friends, then afterwards in 1897 made Bears Lake more of a camping place, from whence he trapped and hunted but did not permanently establish himself until the following year.
>
> Now, may I therefore respectfully solicit your opinion and decision on the matter, whether I have to submit and take a back seat for Mr. Indian, or hold all my former holdings and claim of hay ground.[69]

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[69] Alex McKenzie Sr, Peace River Landing, Alberta, to Frank Oliver, Minister of the Interior, August 16, 1906, DIAND file 777/30-8, vol. 1 (ICC Documents, pp. 81-83). Underlining in original document.

After consulting with Surveyor J. Lestock Reid, the Department chose to reject McKenzie's claim, explaining that, as "Cardinal's location contains only 160 acres with a comparatively small frontage on the Lake, it is thought that this location should not materially interfere with any of your operations, or with any rights which you think you may have acquired in that locality."[50]

The first wave of concerted pressure for lands in the vicinity of Peace River occurred after World War I,[51] as the federal government sought to reintegrate former soldiers into civilian life by settling them on farm lands. The *Soldier Settlement Act* of 1917 made it possible for war veterans to apply for a grant of 160 acres of Crown land in addition to the 160 acres already available to them under the homestead provisions of the *Dominion Lands Act*. In 1919, the Act was amended to enable the Soldier Settlement Board to purchase lands, including Indian lands, for resale to interested ex-soldiers:

> **10.** The [Soldier Settlement] Board may acquire from His Majesty by purchase, upon terms not inconsistent with those of the release or surrender, any Indian lands, which, under the *Indian Act*, have been validly released or surrendered.[52]

The Department of Indian Affairs actively cooperated with the Soldier Settlement Board in efforts to settle returned soldiers on uncultivated or otherwise underutilised Indian land. The following excerpt from a report written in December 1919 by Duncan Campbell Scott, the Deputy Superintendent General of Indian Affairs, summarizes departmental policy regarding soldier settlement:

> As there is pressing need for securing land for the settlement of returned soldiers under the provisions of the *Soldier Settlement Act*, the comparatively large areas of Indian reserve lands throughout the country, which were but scantily used by the Indians, were sought as a source of supply.
>
> This department lost no time in inaugurating prompt and comprehensive measures in collaboration with the Soldier Settlement Board to take a complete survey of all available lands, and to make proper arrangements for placing these at the disposal of the Board. All the unsold surrendered lands in the market were turned over to the Soldier Settlement Board for acquirement, if, on investigation, they found the charac-

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[50] J.D. McLean, Secretary, DIA, to Alexander McKenzie, March 7, 1907, DIAND file 777/30-8, vol. 1 (ICC Documents, p. 87).

[51] In 1911, an inquiry was made concerning IR 151H; however, it appears that interest was not sustained, possibly because the initial inquiry was based on inaccurate information. See J.D. McLean, Secretary, DIA, to Mr Reifenstien, Ottawa, August 29, 1911, DIAND file 777/30-8, vol. 1 (ICC Documents, p. 91).

[52] *An Act to Assist Returned Soldiers in Settling upon the Land, or Soldier Settlement Act* (August 29, 1917), section 4(3), and *Soldier Settlement Act* (July 7, 1919), sections 7 and 10.

> ter of the land suitable for their purposes. It was realized that the Indian reserves in the provinces of Manitoba, Saskatchewan and Alberta might yield extensive regions of cultivable lands.
>
> The areas of the reserves set apart under treaty were generous, but were given as part compensation for the cession of title, and with the intention that, in the future, the proceeds from the sale of the lands might form funds from which the Indians could be maintained. That they have legal title to the lands, which can only be surrendered and sold with their consent, is a fact sometimes lost sight of.
>
> The Department, acting in conjunction with the Board, arranged for a joint examination and valuation of these properties, and Mr. Commissioner W.M. Graham undertook this important duty. When the lands were found to be acceptable to the Board, and when a valuation had been placed upon them, Mr. Graham negotiated a surrender from the Indians.
>
> In no case have the Indians refused to part with their lands for fair and reasonable payments, and the action has resulted in already placing 62,128 acres of land in the hands of the Board.[53]

There was significant interest in acquiring the Duncan's Band reserve land for soldier settlement purposes, but the Department of Indian Affairs refused to pursue a surrender at that time. For reasons to be addressed below, both Scott and Indian Commissioner William M. Graham rejected the numerous proposals submitted by interested third parties.

One of the most determined requests to obtain the Duncan's Band reserve lands for returning soldiers was made to the Minister of the Interior, Arthur Meighen, by Brigadier-General W.A. Griesbach, the Member of Parliament for Edmonton West, on behalf of the Peace River Unionist Association. Writing in May 1919, Griesbach informed the Minister that he was "in receipt of representation in the northern part of Alberta, to the effect that some Indian Reserves in that area are but sparsely inhabited," and he suggested that, since these reserves contained good farm lands, arrangements should be made "whereby these lands be thrown open for settlement."[54] Included within the list of reserves Griesbach and the Peace River Unionist Association sought to have "thrown open" for settlement were the Duncan's IR 151, 151A, 151B, 151C, 151D, 151G, 151H, and 151K:

> The ones we had particularly in mind from the Peace River are those I have numbered 3, 4 [IR 151A], 5, 6 [IR 151], 11 [IR 151K] & 12.... No. 4 at Old Wives Lake

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[53] D.C. Scott, DSGIA, to Arthur Meighen, SGIA, December 1, 1919, Department of Indian Affairs, *Annual Report for the Year Ended March 31, 1919*, 40-41.

[54] Brigadier-General W.A. Griesbach, MP, to Arthur Meighen, Minister of the Interior, May 6, 1919, NA, RG 10, vol. 7535, file 26131-3 (ICC Documents, p. 92).

> [IR 151A] consists of one of the finest pieces of land in the country. Last year on this reserve and on Nos 6-7 & 10 [IR 151, 151C-D, and 151H] there were 68 Indians. This number is probably now reduced to less than 30.... No. 11 at Little Prairie [IR 151K] is an excellent piece of land in well settled country. I have no definite knowledge of the number of Indians living on it but there are very few if any.... I trust this information will be of use to you and that the matter can be arranged as it is too bad that so much fine land should be lying absolutely unused.[55]

Meighen's initial reply of May 7, 1919, was favourable:

> I presume there will be no difficulty in securing a surrender from the Indians in that section of the country. The necessity of securing as much land as possible for the returned men is fixed in the mind of the [Soldier Settlement] Board, and my directions are that every possible effort is to be made in this connection.[56]

After reviewing the status of the Duncan's Band reserves, however, Deputy Superintendent General Scott reported to Meighen:

> I beg to send herewith a correct list of reserves in the Peace River district, Treaty No. 8; these reserves were all set apart under the terms of the treaty, and the Indians, for the most part hunting Indians, have not made any agricultural use of them, although they have cattle and garden plots. Commissioner Graham has arranged to lease certain areas for grazing purposes, but none on the reserves mentioned in this list.
>
> I am not aware whether there are any Dominion lands available in that district, but it seems extraordinary in a place so thinly settled that there should be such early pressure on the Indian reserves....
>
> I do not think that either of us would be favourable to asking for a surrender for sale just at present, but, while this is my opinion, I would be willing to further discuss the matter with Commissioner Graham.[57]

Graham agreed with Scott:

> It seems strange to me that the Indians should be called upon to surrender lands in that district at this early date, as there must be large areas of dominion lands available. As the district must be very thinly settled, personally I do not think that we

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[55] L.W. Brown, Peace River Unionists Association, to Brigadier General W.A. Griesbach, MP, June 2, 1919, NA, RG 10, vol. 7535, file 26131-3 (ICC Documents, pp. 94-96). The evidence in this inquiry has not yielded any additional information regarding the Peace River Unionists. It is clear, however, that the group was well connected with influential people such as Griesbach and had the means to collect this reasonably thorough list of local reserves.

[56] Arthur Meighen, Minister of the Interior, to Brigadier General W.A. Griesbach, MP, May 7, 1919, NA, RG 10, vol. 7535, file 26131-3 (ICC Documents, p. 93).

[57] D.C. Scott, DSGIA, to Arthur Meighen, SGIA, June 13, 1919, NA, RG 10, vol. 7535, file 26131-3 (ICC Documents, p. 100).

> should attempt to get these lands surrendered until such time as other available lands in the district are exhausted.[58]

Despite this reply, Griesbach continued to pressure government officials to open up these lands for soldier settlement.

On September 23, 1919, Meighen's private secretary forwarded to the Department an excerpt from a letter requesting the opening of a series of reserves in the Peace River District for settlement purposes. Although the record does not disclose the name of the letter's author, the wording was nearly identical to the previous request from the Peace River Unionist Association and its proponent, Griesbach, suggesting that both had the same source. At any rate, J.D. McLean, Secretary of the Department, forwarded the following response to Meighen's private secretary, emphasizing Indian Affairs' continued rejection of the proposal:

> With reference to your memorandum of the 23rd instant, with respect to the opening up for settlement of certain reserves in the northern part of Alberta, I beg to refer to Mr. Scott's memorandum of the 13th June, last, addressed to Hon. Mr. Meighen, dealing with this matter.
>
> The Minister approved of the last paragraph of that memorandum, and on 21st June, Mr. Graham was written to and asked for his views. He replied on 16th July supporting Mr. Scott's views. I do not see, therefore, that I can add anything to Mr. Scott's memorandum.[59]

On February 28, 1920, Griesbach again solicited the support of the Minister of the Interior. Once again, the Deputy Superintendent General of Indian Affairs declined the request:

> Commissioner Graham and I agreed that we should not throw open for soldier settlement Indian lands on these far northern reserves until other available lands have been exhausted. Commissioner Graham expects to be able to visit the Lesser Slave Lake agency this summer, and I would rather not take decisive action until I have a report from him. Meanwhile, it might be possible for the Dominion Lands Branch to say whether it is a fact that, as represented to Col. Griesbach, the country surrounding these reserves is settled up, and no other land is immediately available.[60]

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[58] W.M. Graham, Commissioner, to D.C. Scott, DSGIA, July 17, 1919, NA, RG 10, vol. 7535, file 26131-3 (ICC Documents, p. 104).

[59] J.D. McLean, Secretary, DIA, to Mr Mitchell, Private Secretary, Minister of the Interior, September 24, 1919, NA, RG 10, vol. 7535, file 26131-3 (ICC Documents, p. 115).

[60] D.C. Scott to Arthur Meighen, Minister of the Interior, March 2, 1920, NA, RG 10, vol. 7535, file 26131-3 (ICC Documents, p. 122).

Although the historical record does not reveal whether the Department of Indian Affairs conferred with the Dominion Lands Office regarding the availability of Crown lands in the Peace River District, other correspondence discloses that a demand for these lands did exist. Between June 17, 1919, and December 31, 1922, the Department of Indian Affairs received no fewer than eight additional requests proposing that Indian lands in the Peace River District be "opened up" for agricultural settlement.[61] Despite these requests, the Department remained committed to the policy articulated in Scott's June 13, 1919, memorandum to Meighen: that reserve lands in the Peace River area should not be surrendered until such time as other available lands in the district were exhausted.

In 1922, however, a particular issue refocused the Department's attention on the Duncan's Band reserves and, in doing so, marked a departure from the previous policy regarding these lands. In a letter dated May 16, 1922, R. Cruickshank, Dominion Lands Agent at Peace River, informed Acting Indian Agent Harold Laird that an illegal encroachment had occurred on IR 151G, one of the small reserves previously occupied by "Gillian" Bell:

> In reference to the above which is situated in River Lot #5, Shaftesbury Settlement, Mr. Arthur Charles Wright filed upon River Lot #5, on April 6th, 1921, and unfortunately has placed most, if not all, his improvements upon the Reserve.
>
> I do not believe Mr. Wright did this purposely and as soon as he discovered his mistake he informed me and stated that he would willingly buy the 5 acres at a reasonable figure.[62]

That October, Laird forwarded this information to departmental headquarters, along with the results of his initial investigation of the situation:

> The Indian Reserve, No. 151 G., mentioned in the Agent's letter, was surveyed for Gillian Bell, one of Duncan Tustawits' Band, who died in 1913. His widow married a Halfbreed named LaPretre and received a cheque for commutation on June 29, 1915.

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[61] See, for example, Lieutenant L.M. Power, Peace River, Alberta, to the Department of the Interior, June 17, 1919, NA, RG 10, vol. 7535, file 26131-3 (ICC Documents, p. 101); R.A. Brownell, Drumheller, Alberta, to Minister of the Interior, July 30, 1919, NA, RG 10, vol. 7535, file 26131-3 (ICC Documents, pp. 105-06); Mr Mitchell, Private Secretary to Minister of the Interior, to D.C. Scott, September 10, 1919, NA, RG 10, vol. 7535, file 26131-3 (ICC Documents, p. 108); S. Hargrave, Smith, Alberta, to the Indian Department, March 3, 1920, NA, RG 10, vol. 7535, file 26131-3 (ICC Documents, p. 123); F.H.K. Macintyre, Edmonton, to Department of Indian Affairs, March 4, 1920, NA, RG 10, vol. 7535, file 26131-3 (ICC Documents, p. 125); Harold Laird, Agent, to Alex. Kennedy, Peace River, November 12, 1921, DIAND file 777/30-8, vol. 1 (ICC Documents, p. 127); and F. Nelson, Assistant Secretary, Department of the Interior, to A.E. Golding, Griffin Creek, Alberta, June 22, 1922, DIAND file 777/30-7-151A, vol. 1 (ICC Documents, p. 130).

[62] R. Cruickshank, Dominion Lands Agent, to Harold Laird, Indian Agent, Grouard, Alberta, May 16, 1922, DIAND file 777/30-8, vol. 1 (ICC Documents, p. 128).

> Since the latter date no one has lived on this land and the old buildings have fallen down and been burned. The Reserve contains only some 5 acres of land, and is of very little land [sic] except as a residential lot.
>
> When I visited the Reserve, I found, as stated by Mr. Cruickshank, that Mr. Wright had built his house inside the Reserve, a few rods from the eastern boundary. I would estimate the value of the improvements made between $900.00 and $1,000.00.[63]

After reviewing the circumstances surrounding this encroachment on IR 151G, Donald Robertson, the Department's Chief Surveyor, recommended a surrender for sale:

> Mr. Wright has stated he would be willing to buy the 5.61 acres comprising this reserve at a reasonable figure. Under the circumstances it would be necessary to receive a surrender from the band, in order to dispose of the property.... I would recommend that an endeavour be made to secure a surrender for this purpose.[64]

Nevertheless, despite favouring a surrender, Robertson recognized that obtaining one might be difficult, having regard for band members' traditional way of life:

> The matter of obtaining this surrender does not appear to be immediate and it is improbable that the Agent could obtain the attendance of a sufficient number of the voting members of the band during the trapping season. It might be indicated to him that the Department fully realizes this but expects that he will take the matter in hand at the earliest opportunity.[65]

Early in the new year, the necessary surrender documents were drawn up and forwarded to Laird, with instructions authorizing him to consult the Band regarding the surrender of the reserve in question:

> With further reference to your letter of the 31st October last relating to certain buildings erected by A.C. Wright on Indian reserve No. 151-G, I have to inform you that the Department proposes to endeavour to obtain a surrender of this reserve in order that it may be sold. If this surrender is obtained, Mr. Wright will no doubt have an opportunity of buying it when offered for sale.[66]

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[63] H. Laird, Acting Indian Agent, to Assistant Deputy and Secretary, DIA, October 31, 1922, DIAND file 777/30-8, vol. 1 (ICC Documents, p. 135).

[64] Donald Robertson, Chief Surveyor, DIA, to Deputy Minister, January 5, 1923, DIAND file 777/30-8, vol. 1 (ICC Documents, p. 142).

[65] Donald Robertson, Chief Surveyor, to Lands Branch, DIA, January 11, 1923, DIAND file 777/30-8, vol. 1 (ICC Documents, p. 145).

[66] J.D. McLean, Assistant Deputy and Secretary, to H. Laird, Acting Indian Agent, January 12, 1923, DIAND file 777/30-8, vol. 1 (ICC Documents, p. 146).

On January 23, 1923, Laird responded to these instructions by proposing that, while attempting to obtain the surrender of IR 151G, "the Department should also take surrenders of Reserves 151B., 151C., 151D., 151E., 151F., 151H., and 151K." Laird's proposal included the surrender of all the Band's reserve lands except IR 151 and 151A, on the grounds that "[t]here has been no work done on any of them for a considerable number of years, and if they are surrendered the Indians will still have ample land remaining in Reserves 151 and 151A., which contain 3,520 and 5,120 acres respectively of good farming land."[67]

At the same time that Laird suggested the surrender of the Band's reserves located along the north bank of the Peace River, J.B. Early, the local farmer owning lands adjacent to IR 151E, had submitted to the Department a proposal to lease that reserve on the following terms:

> I want very much to consummate a lease on the Testawitch ranch [IR 151E] adjoining the old Carson farm.
>
> I have the consent of the entire Testawitch family to a lease of this place comprising approximately a half section.
>
> I remember that you stated that there were others besides the Testawitch family that are interested in this place, known locally as the "Duncan Ranch". However, "Chief" Samuel T. seems to think he is in control, subject however to the ratification of your department. So far as I can learn, those Indians outside the "Duncans" are in the minority, and not in position to block the matter, and so long as they get their share of the lease money, they would undoubtedly be very glad it was leased. I would like to arrange at least a 5 yr. lease. Ten yrs would suit me better. Then I would put in an irrigation system and make this place very valuable. I would also clear up all the small brush land and make a beautiful farm of it.... The Indians have all moved away from the river.
>
> You gave your consent to let me put in 15 acres last year, which I would have done had it rained so I could have plowed it. But I do not wish to incur the expense of putting an irrigation system on the place without a 5 yr. lease or longer. I would pay $2.00 per acre cash rent for the 75 acres that was once plowed up, now growing up to weeds and rose bushes. After 5 years free use of any land cleared and broken up by me would thereafter pay $2.00 cash rent for that.... Of course the old Chief and many of the family is dead, and the rest seem to have no interest in operating the place. Still they refuse to sell this river home ranch. Under the circumstances it seems to me that your department would be glad to have the place handled in a systematic way.

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[67] Harold Laird, Acting Indian Agent, to the Assistant Deputy and Secretary, DIA, January 23, 1923, DIAND file 777/30-8, vol. 1 (ICC Documents, p. 150).

> I have made a good road across the creek above the house and bridged the stream.
>
> I would pay 10¢ per acre for the pasture. Let me hear from you again soon.[68]

Despite the detailed nature of this proposal – which included proposed rental rates and indicated that Early had discussed the proposition with certain members of the Band – Early's request remained unanswered until he enlisted the aid of his Member of Parliament, D.M. Kennedy, on April 10, 1923, to make inquiries on his behalf:

> Adjoining this tract of land [Early's own land] on the east is a small Indian Reserve which the old chief Testauitch (Duncan) used as his home until his death a few years ago. The place is now practically abandoned, the fences all torn down for firewood, their farm tools scattered and all is going to rack. The Duncan boys will not farm the place.
>
> I have the consent of resident and remaining "Breeds" to rent this Dincan [sic] farm for a period of years, and I accordingly applied to Agent Laird at Grouard to get consent of the Indian Department. Mr. Laird referred the matter to the head office at Ottawa, I have never heard from them.
>
> I have offered to give $2.00 per acre cash rent for the 75 acres under cultivation. The place is very foul with mustard and wild oats. But in raising dairy feed for the cattle I could clean it up.
>
> Would you kindly intercede for me and see if the Department would grant me a lease on this tract. The Indians do not wish to sell it neither will they farm it. My Jersey herd now numbers close to a hundred head, and we could use this tract to good advantage. If I could get a 5 year lease I would put the place under irrigation and make a valuable place of it.[69]

Kennedy forwarded his constituent's request to the Department on April 23, 1923.[70] After reviewing the issue, Deputy Superintendent General Scott responded the next day:

> I have received your letter of the 23rd instant inclosing copy of one received from J.B. Early, of Peace River, Alberta, who wishes to secure a lease of a small Indian reserve in the Shaftesbury Settlement.
>
> The Department proposes endeavouring to secure a surrender of the reserve in question as soon as possible, and in the event of the necessary release being obtained, Mr. Early's application will be given consideration.

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[68] J.B. Early, Peace River, to Harold Laird, Indian Agent, January 12, 1923 , DIAND file 777/30-8, vol. 1 (ICC Documents, pp. 147-49).

[69] J.B. Early, Peace River, to D.M. Kennedy, MP, April 10, 1923, DIAND file 777/30-8, vol. 1 (ICC Documents, p. 161).

[70] D.M. Kennedy, MP, to D.C. Scott, DSGIA, April 23, 1923, DIAND file 777/30-8, vol. 1 (ICC Documents, p. 162).

> The surrender documents will be forwarded to Agent Laird very shortly, and Mr. Early will be communicated with in the matter later on.[71]

Scott's letter did not specify whether the proposed surrender was intended for reason of sale or lease. As noted above, the merits of surrendering for sale the smaller Duncan's Band reserves located along the northern bank of the Peace River had been discussed by Department officials during the previous months. The ambiguity of Scott's response from April 24, 1924, does not necessarily suggest a finding that the same course of action – i.e., a surrender for sale – was being considered for IR 151E at this later date.

Nor does the record reveal whether the Department seriously considered the merits of entering into a lease agreement with Early as a means of generating revenue for the Duncan's Band. Given Scott's perfunctory response to the proposal, it is reasonable to infer that the Department was not favourably disposed towards the option of leasing IR 151E. Certainly, there is no evidence that the Band was ever approached by the Department – despite Early's repeated assurances that his request to lease IR 151E met with the approval of some or all of the members of the Duncan's Band.

It is interesting to note, however, that, during the same time period, similar leasing proposals involving other First Nations within the Lesser Slave Lake Agency had been considered by the Department and brought to the attention of those bands. The 1919 exchange of letters between Scott and Minister of the Interior Arthur Meighen confirms that certain reserve lands in the district – excluding lands reserved for the Duncan's Band – had previously been leased for grazing purposes.[72] Furthermore, during the early 1920s, requests for grazing leases on reserve lands near Fairview, Alberta, were frequently received at departmental headquarters. For example, in 1920, the Private Secretary to the Minister of the Interior wrote to the Department of Indian Affairs on behalf of a constituent to inquire into a lease of Beaver IR 152A:[73]

> Mr. H.F. Robertson, of Waterhole, Alta., a returned soldier, writes with reference to a small Indian reserve on the banks of the Peace River in Township 80, Range 3, West 6th. Mr Robertson states that he has leased all the lands around this reserve, and

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[71] D.C. Scott, DSGIA, to D.M. Kennedy, MP, April 24, 1923, DIAND file 777/30-8, vol. 1 (ICC Documents, p. 163).

[72] D.C. Scott, DSGIA, to Arthur Meighen, SGIA, June 13, 1919, NA, RG 10, vol. 7535, file 26131-3 (ICC Documents, p. 100): "Commissioner Graham has arranged to lease certain areas for grazing purposes, but none of the reserves mentioned in this list."

[73] Beaver IR 152A was located close to the village of Dunvegan, approximately 50 km southwest of Duncan's IR 151A near Brownvale. See map of claim area for more detail.

> would like, if possible, to obtain a lease of the reserve, which he claims has never been used for anything as all the Indians of that particular tribe are now deceased. Please advise whether or not the lease could be granted, and, if so, on what terms."[74]

On receipt of this request, Scott reported to the Superintendent General that the reserve in question – IR 152A, containing 260 acres – "was laid out in 1905, under the terms of Treaty 8, for Neepee Chief, a Beaver Indian, who is now dead." Scott assured the Minister that, if he wished, the Department "might arrange with the heirs of Neepee Chief to lease this land."[75] Subsequently, Agent Laird was authorized to negotiate such an arrangement, but he reported that the Beaver Indians were not interested in leasing their land, preferring instead to sell.[76] Robertson's lease proposal was consequently given no further attention.

Another proposal involving the 15,000-acre Beaver IR 152 was submitted on behalf of farmers residing near the villages of Waterhole, Dunvegan, and Fairview, Alberta, to D.M. Kennedy, their Member of Parliament:

> I [A.D. Madden], backed by some three hundred settlers of the district, wish to apply for a grazing lease on the whole of the Beaver Indian Reserve No. 152, which contains about thirty-six sections of good pasture lands, with watering facilities. You are acquainted with this tract of land, and also know that it is not used even by the Indians, while the country is in great need of this. It is very handy to the whole district, and as I am located in the centre between the two branches of the reserve [IR 152 & 152A] I would be in a good position to look after the cattle entrusted to my care.
>
> The Indians from this reserve have expressed their willingness to have it leased, as they seldom if ever stay on it. If necessary I can get a signed list of both the Indians interested or the settlers who wish me to try and obtain this lease.
>
> If you can get this through it will be very much appreciated and will be a boon to the whole district. It seems too bad to have such splendid pasture right in the centre of the district, going to waste and at the same time the farmers forced to go out of the raising of cattle for lack of those very facilities.
>
> ... This of course would be on the usual terms of .04 cts [sic] per acre and for from five to ten years."[77]

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[74] Private Secretary, Minister of the Interior, to D.C. Scott, DSGIA, April 6, 1920, NA, RG 10, vol. 7544, file 29131-9 (ICC Exhibit 15, vol. 2).

[75] D.C. Scott, DSGIA, to Arthur Meighen, Minister of the Interior, April 9, 1920, NA, RG 10, vol. 7544, file 29131-9, pt 1 (ICC Exhibit 15, vol. 2).

[76] W.M. Graham, Commissioner, to D.C. Scott, DSGIA, November 2, 1920, NA, RG 10, vol. 7544, file 29131-9, pt 1 (ICC Exhibit 15, vol. 2).

[77] A.D. Madden to D.M. Kennedy, MP, April 24, 1922, NA, RG 10, vol. 7544, file 29131-9, pt 1 (ICC Exhibit 15, vol. 2).

Kennedy forwarded this request to the Superintendent General of Indian Affairs on May 4, 1922.[78] As a result, the Department requested a detailed report on the issue from Laird.[79] On May 16, 1922, Laird informed Commissioner Graham of his confidence that a surrender of Beaver IR 152 could be arranged:

> I beg to report that the Western third of Beaver Indian Reserve No. 152 is not used at all by the Indians and might be leased for grazing purposes, but as it is a pretty fine piece of agricultural land, it would be a pity to tie it up in such leases except in short terms.
>
> I think a surrender of this portion of the reserve could be obtained without difficulty as a number of the Indians have expressed their willingness to part with some of their lands.
>
> There are 24 square miles in the reserve, and 138 Indians interested in it although less than 50 habitually reside there, the greater number living on Grande Prairie.[80]

Graham's opinion regarding the merit of the lease proposal, however, differed markedly from that expressed by Laird. In a letter dated May 12, 1922, Graham advised Scott of his reservations about the Department's ability to administer such an arrangement:

> In the past no land has been leased by the Department in that part of the country, and it is for the Department to decide whether it would be a wise plan to do so now. In my opinion to do so would be unwise as we have no organization in that district by which lessees could be controlled.[81]

Graham expressed similar sentiments on May 25, 1922, when, as requested, he forwarded Laird's report on the issue to Ottawa. On this occasion, however, Graham also proposed terms that the Department might want to incorporate should it decide, despite his opposition, to proceed with leasing:

> I enclose, herewith, copy of a reply received from Mr. Laird dated the 16th instant, and you will note that the Acting Agent states he thinks no difficulty will be incurred in securing a surrender. In my letter of the 12th I pointed out that we have no organiza-

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[78] D.M. Kennedy, MP, to Minister of the Interior, May 4, 1922, NA, RG 10, vol. 7544, file 29131-9, pt 1 (ICC Exhibit 15, vol. 2).

[79] See W.M. Graham, Indian Commissioner, to D.C. Scott, May 12, 1922, NA, RG 10, vol. 7544, file 29131-9, pt 1 (ICC Exhibit 15, vol. 2).

[80] H. Laird, Acting Indian Agent, to W.M. Graham, Indian Commissioner, May 16, 1922, NA, RG 10, vol. 7544, file 29131-9, pt 1 (ICC Exhibit 15, vol. 2).

[81] W.M. Graham, Indian Commissioner, to D.C. Scott, May 12, 1922, NA, RG 10, vol. 7544, file 29131-9, pt 1 (ICC Exhibit 15, vol. 2).

> tion in that district by which lessees could be controlled, but the matter of securing a surrender, and leasing this land is one which I leave to the discretion of the Department only making a suggestion that we should be paid at least ten cents (.10¢) [sic] per acre as a rental, and if a surrender is taken it would be preferable to lease the whole area under one lease with the usual cancellation clauses inserted.[82]

Before a decision could be made or instructions issued by the Department, a second lease proposal was submitted by W.R. Robertson, a sheep rancher from Vanrena, Alberta, who sought to "obtain a lease of 1000 acres on the Beaver Indian Reserve No. 152, for a period of ten years." Noting that "[t]he Chief claims he only has authority to lease for three years," Robertson implied that he had been in contact with some of the band members residing on the reserve at the time and that they may have been interested in the proposal.[83] Regardless, the issue remained unaddressed for a period of months until yet another lease proposal was submitted to Ottawa by James Wylie of Waterhole, Alberta.[84]

Reporting on the recent flurry of local interest in the reserve, Graham indicated on January 18, 1923, that he would "be glad to receive the Department's instructions."[85] On March 29, 1923, the Department provided Laird with the necessary surrender documents, subject to the following instructions:

> Inclosed are the necessary documents for the purpose of submission to the Beaver Band of Indians, with a view to obtaining a surrender for leasing purposes of approximately the western third of the Beaver Indian Reserve No. 152. In this connection I would direct your attention to [the] letter addressed by you to Commissioner Graham and dated the 16th of May last year, in which you stated you were of the opinion that a surrender of this portion of the reserve could be obtained without difficulty.
>
> I am also inclosing for your information and guidance copy of instructions to Agents in taking surrenders, and have to call your attention particularly to the requirement of furnishing a voters' list showing the number voting for this surrender and the number voting against.[86]

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[82] W.M. Graham, Indian Commissioner, to D.C. Scott, May 25, 1922, NA, RG 10, vol. 7544, file 29131-9, pt 1 (ICC Exhibit 15, vol. 2).

[83] W.E. Robertson to Department of Indian Affairs, July 11, 1922, NA, RG 10, vol. 7544, file 29131-9, pt 1 (ICC Exhibit 15, vol. 2).

[84] See W.M. Graham, Indian Commissioner, to Secretary, DIA, January 18, 1923, NA, RG 10, vol. 7544, file 29131-9, pt 1 (ICC Exhibit 15, vol. 2). Note that, although this document is dated "January 18, *1922*" on its face, the chronology of correspondence referred to within it reveals that the actual date should have been January 18, *1923*.

[85] W.M. Graham, Indian Commissioner, to Secretary, DIA, January 18, 1923, NA, RG 10, vol. 7544, file 29131-9, pt 1 (ICC Exhibit 15, vol. 2).

[86] D.C. Scott, DSGIA, to H. Laird, Indian Agent, March 29, 1923, NA, RG 10, vol. 7544, file 29131-9, pt 1 (ICC Exhibit 15, vol. 2). The "instructions to Agents in taking surrenders" referred to in this correspondence are likely those drafted by Scott himself and dated May 16, 1914.

F2.

Laird submitted a report to Ottawa on September 10, 1923, outlining his efforts "in regard the surrender of a portion of the Beaver Reserve, No. 152," from which it can be concluded that his attempts to arrange a surrender meeting during the summer of 1923 met with little success:

> I have the honor to report in regard to the surrender of a portion of the Beaver Reserve, No. 152, that on receipt of the papers I made arrangements to take surrender of this land from the Band on Treaty day, July 31st.
>
> In connection with this I forwarded the necessary notices to Mr. Duncan MacDonald, who has interpreted for me for some years, at Dunvegan, and instructed him to have the notices posted at least eight days before the above date, (the 21st) [sic] and to remain on the Reserve and to explain to each voter the meaning of the surrender to lease for grazing purposes....
>
> On my arrival at Fort St. John to pay Treaty on July 18th, I found eight Indians, belonging to the Dunvegan Reserve. These had no notice of the meeting called on their Reserve, as they had been hunting west of the Clear Hills. They came to Fort St. Johns [sic] to receive their Treaty money.
>
> Consequently, when I reached the Dunvegan Beaver Reserve I found but three Indians there, who were more immediately interested in the surrender, and I was therefore unable to take a vote....
>
> It will hardly be possible to arrange for another meeting until Treaty time next year.[87]

The record reveals that Laird's attempts to arrange a surrender meeting during the summer of 1924 were similarly unsuccessful and that the proposed surrender of Beaver IR 152 was postponed until a later date, in anticipation that a majority of the Band could be assembled at such time to attend a surrender meeting.[88] The Department received another request in December 1924 for third-party grazing privileges on Beaver IR 152A, but the lease initiative in general had lost its lustre for Department officials. They postponed it indefinitely in February 1925:

> I beg to acknowledge the receipt of your letter of the 28th ultimo, together with inclosures, with reference to the effort recently made by Mr. Agent Laird to secure a surrender of portion of Beaver Reserve, No. 152. I think the matter might be allowed to rest for the present, and no further attempt made to secure a release of any portion of the reserve unless some renewal of interest in the matter occurs.[89]

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[87] H. Laird, Acting Indian Agent, to DIA, September 10, 1923, NA, RG 10, vol. 7544, file 29131-9, pt 1 (ICC Exhibit 15, vol. 2).

[88] H. Laird, Acting Indian Agent, to DIA, January 17, 1925, NA, RG 10, vol. 7544, file 29131-9, pt 1 (ICC Exhibit 15, vol. 2); H. Laird, Acting Indian Agent, to W.M. Graham, Indian Commissioner, January 21, 1925, NA, RG 10, vol. 7544, file 29131-9, pt 1 (ICC Exhibit 15, vol. 2).

[89] J.D. McLean, Assistant Deputy and Secretary, to W.M. Graham, Indian Commissioner, February 3, 1925, NA, RG 10, vol. 7544, file 29131-9, pt 1 (ICC Exhibit 15, vol. 2).

Although the Department of Indian Affairs never concluded lease agreements for IR 152 and 152A between the Beaver Band and interested third parties, the foregoing historical record amply demonstrates that the Department considered the possibility of leasing reserve lands as a viable means of generating revenue for the benefit of the Band. Nevertheless, the record also reveals a preference by Department officials to obtain surrenders of reserve lands for sale where those lands were not being used by band members for farming.

LESSER SLAVE LAKE AGENCY: PRELUDE TO THE SURRENDERS, 1920–27

The proximity of reserve lands in the Lesser Slave Lake Agency to thriving frontier settlements including Peace River, Grimshaw, Berwyn, the Shaftesbury Settlement, Fairview, Waterhole, Dunvegan, Spirit River, and Kinuso meant that pressure for the surrender of these reserve lands was inevitable, particularly as the availability of Crown lands in the area diminished. On the many occasions when private individuals asked about acquiring reserve lands in the region, the Department generally responded that the lands in question had not been surrendered and were therefore not available for settlement purposes. A letter dated April 30, 1925, typifies the position maintained by the Department on these occasions:

> I beg to acknowledge the receipt of your letter of recent date, inquiring whether there was any prospect of certain small Indian Reserves north of the Peace River and in the vicinity of Waterhole, Berwyn and Peace River being made available for sale to settlers for farming purposes.
>
> The Department is not disposed to consider such disposition of these reserves at the present time, and in any event they could not be sold unless and until surrendered for that purpose by the Indians holding them. Doubtless there must be considerable Dominion lands in that district available for settlement purposes, and in the interests of your clients you might possibly make some satisfactory arrangement with the Department of the Interior, but for the present at least the Indian lands to which you refer are not available for purchase.[90]

When similar requests were advanced by municipal governments or by provincial or federal politicians, however, the response from Ottawa was noticeably different, especially if the inquiries were submitted for reasons of urban and/or economic development. Such inquiries generally received greater attention from the Department and often resulted in surrender discussions being held with the band concerned.

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[90] J.D. McLean, Acting Deputy Superintendent General, to Lawlor & Sissens, Barristers, Grande Prairie, Alberta, April 30, 1925, NA, RG 10, vol. 7544, file 29131-9, pt 1 (ICC Exhibit 15, vol. 2). See also A.F. MacKenzie, DIA, to August Linge, Berwyn, Alberta, July 20, 1925, DIAND, PARC file 777/30-7-151 A, vol. 1 (ICC Documents, p. 176).

The submissions of the First Nation in this inquiry challenge the validity of the 1928 surrender, in part based on the alleged similarity of the factual circumstances surrounding the surrender of IR 152 by the neighbouring Beaver Band and the failed attempt to secure a surrender of reserve lands belonging to the Swan River Band. Clearly, Canada sought to obtain surrenders from all three Bands in the Lesser Slave Lake Agency within one tour of the area by representatives of the Department of Indian Affairs, and the Beaver surrender has recently become the subject of a specific claim that has been accepted for negotiation by Canada. Although the formal basis for that claim has not been placed in evidence before the Commission, counsel for the Duncan's First Nation points to evidence that, first, the surrender was taken in meetings with two or more small groups of Beaver Band members, and, second, two of the alleged participants at these meetings – including one who appears to have signed the surrender document – were dead before the meetings took place.[91] If true, these facts would run afoul of section 51 of the 1927 *Indian Act* and undermine the validity of the Beaver surrender. Counsel argues that, since the Beaver surrender was taken by the same individuals who allegedly met with the Duncan's Band, the propriety of the Duncan's surrender must be similarly doubtful. Therefore, before dealing with the particular circumstances of the Duncan's surrender, the Commission will set forth some of the details arising from Canada's surrender discussions with these other two Bands to provide a broader context within which to consider the surrender by the Duncan's Band.

Events Preceding the Swan River Band Surrender Meetings

Located just south of Lesser Slave Lake on the main trunk of the Northern Alberta Railway, the town of Kinuso, Alberta, was constructed on reserve lands surrendered from Swan River IR 150E in 1916.[92] Upon founding, the town itself was more or less surrounded by reserve lands that remained held for the benefit of the Band. As such, it was foreseeable that local interest in the Swan River reserve would present itself as the town and surrounding settlement expanded. For instance, in March 1920, a prospective soldier-settler from Smith, Alberta, wrote to ask the Department of Indian Affairs to "kindly inform [him] when the Dominion Government intends to open the Indian Reserves of Swan River and Drift Pile [sic] Alta. for Soldiers Settlement."[93] As noted previously, an inquiry submitted by a single settler was not likely to persuade the Department to initiate surrender proceedings with a band. The Department's reaction tended to be more purposeful when proposals of this kind were put forward by political stakeholders.

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[91] G.N. Reddekopp, "The Creation and Surrender of the Beaver and Duncan's Band's Reserves," pp 111-12 and 126-27 (ICC Exhibit 5).

[92] The members of the Swan River Band are descendants of a larger group formerly known as the "Lesser Slave Lake Indians." These individuals entered Treaty 8 in 1899 under Chief Kinoosayoo and were thereafter divided into the Driftpile, Grouard, Sawridge, Sucker Creek, and Swan River Bands.

The first instance of political pressure for the surrender of Swan River Band reserve lands after 1920 was submitted in December 1922, when J.L. Côté,[94] the provincial Member of the Legislative Assembly for Athabasca-Grouard, wrote to the Department on behalf of the residents of Kinuso:

> I am enclosing a letter from one of my Constituents Mr. Wilfrid L. McKillop of Kinuso who desires on behalf of himself and the other residents to have the Indian Reserve at Swan River opened for settlers.
>
> I realize it would be a great benefit, both for the village of Kinuso, which is actually built on the Reserve, and for the settlements adjoining, if this could be done.[95]

Following Côté's effort, the residents of Kinuso forwarded to the Minister of the Interior a petition containing the signatures of over 100 residents, farmers, and business persons from Kinuso and environs, repeating the request that the Swan River Band lands be opened for settlement purposes.[96] On receipt of the petition, the Minister of the Interior requested details about the proposal, to which Scott responded on February 20, 1923:

> With respect to the attached correspondence received by the Minister from Hon. J.L. Côté of Edmonton, I would suggest that we forward the copies to Commissioner Graham, of Regina, for his report.
>
> The communication refers to the question of opening up for settlement purposes of the Indian Reserve at Swan River, which action, of course, could not be taken without first obtaining a surrender of the reserve from the Indians. Commissioner

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[93] S. Hargrave, Smith, Alberta, to DIA, March 3, 1920, NA, RG 10, vol. 7535, file 26131-3 (ICC Documents, p. 123).

[94] A former surveyor with the Department of the Interior, Jean-Léon Côté was elected to the Alberta provincial legislature in 1909. He was appointed to the provincial Cabinet in 1918, and eventually served as Minister of Mines and Minster of Railways and Telephones. He was appointed to the federal Senate in 1923. See *The Canadian Encyclopedia*, 2nd ed. (Edmonton: Hurtig Publishers, 1988), 524.

[95] J.L. Côté, MLA, to J.D. McLean, Assistant Deputy Minister, DIA, December 18, 1922, NA, RG 10, vol. 7544, file 29131-5, pt 1. (ICC Documents, p. 139).

[96] Residents of the Town of Kinuso to C. Stewart, Minister of the Interior, January 23, 1923, NA, RG 10, vol. 7544, file 29131-5, pt 1 (ICC Documents, pp. 152-54).

> Graham is doubtless familiar with local conditions, and before dealing with the matter definitely, it would be better to obtain his views and recommendations.[97]

By April 1923, D.M. Kennedy, the federal Member of Parliament for West Edmonton, had also inquired into the surrender of portions of the Beaver and Swan River reserves. In a letter to Kennedy dated April 27, 1923, Scott responded:

> Where reserves contain larger areas than are required for Indian use, and when surrounding settlement warrants such action, it is the policy of the Department to negotiate for a surrender of the excess areas, in order that the lands, if released, may be sold for agricultural purposes. It is essential, however, in such cases, to review local conditions carefully, as it would be a matter of dissatisfaction on the part of the Indians should large areas be released and remain unsold. The Department invariably endeavors to conduct a sale of such lands as soon as possible after surrender, as the Indians quite naturally, expect to obtain a substantial payment without delay.
>
> The initiative in such matters usually rests with the Department, and is based upon general conditions and the prospective demand for additional agricultural lands. I quite agree with your view, that when conditions warrant, it is desirable that proper and beneficial use should be made of Indian lands not required for reserve purposes, but before obtaining a surrender and listing the lands for sale, the Department should feel assured that a considerable portion at least can be disposed of almost immediately. Crop conditions and the general agricultural situation are governing factors in this regard.
>
> As a matter of fact, at present Commissioner Graham, of Regina, is acting upon instructions from the Department to obtain a surrender of twenty sections of the Swan River Reserve, and we anticipate that a release of this area will be secured shortly. Similar action is contemplated with respect to the western third of the Beaver Reserve, which, I understand, contains some very good agricultural land. In both cases Departmental action will be expedited in every possible way.[98]

Before Graham submitted his report, however, the Department received correspondence from the Chief of the Swan River Band stating that neither he nor his headmen supported the various proposals to surrender portions of the Band's reserve lands. In clear terms, the Chief outlined his position on the issue of surrender:

> I am told that some white people are going secretly through my reserves with a petition and trying my people, to sign, on purpose of having them abandoning the Swan Reserve and consenting to sell it.

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[97] D.C. Scott, Deputy Superintendent General, to J.E. Featherston, Private Secretary to the Minister of the Interior, February 20, 1923, NA, RG 10, vol. 7544, file 29131-5, pt 1 (ICC Documents, p. 151).

[98] Superintendent General, DIA, to D.M. Kennedy, MP, April 27, 1923, NA, RG 10, vol. 7544, file 29131-9, pt 1 (ICC Exhibit 15, vol. 2).

> Neither I, the Chief, nor my headmen, though we should, I think [illegible]to be consulted, have been asked our opinion about it [illegible] they go to [the]weak-minded to make by the number of names impression on the Depart[ment].
>
> So that you can judge the injustice of such petition, I wish to [have] you know that I am absolutely against the cession of any of our R[eserve] and therefore that for all the gold in the world, I cannot consent [to] see the Swan River Reserve be sold and the reasons, in my opinion, [illegible] quite serious.
>
> At first, the number of children on my reserve, instead of dec[reasing], increase; so that the need of land is not less at present than before.
>
> Secondly, I admit that in the past, the principal way of living has been fishing and hunting; but in a very near future, it will be [illegible] for it and so the young ones will have to rely on the culture [illegible] need good lands.[99]

Although certain key words in this document have been lost to the ravages of time, it seems clear enough that the Chief considered that the future of the Swan River Band lay in its reserve lands.

On May 1, 1923, Graham submitted his report to Scott with regard to the proposed surrender, including a detailed blueprint of the quarter and fractional sections that Laird had "suggest[ed] might be surrendered for sale" to settlers.[100] Despite the opposition previously expressed by the Chief of the Swan River Band, Scott instructed Graham to proceed with surrender negotiations:

> The necessary documents of surrender to which a blue print is also attached are inclosed herewith, for submission to the Indians at the first convenient opportunity. With regard to the fractions of land on both sides of the railway, and adjacent to the Town of Kinuso, these have been included in the description for sale as you are of the opinion that it would not be advisable to lease them, as recommended by the Agent [Laird].[101]

Although it is likely that Laird was informed of this decision before his departure to make treaty payments in May or June, by the end of 1923 Graham had to report that Laird had not been successful in his attempt to assemble the requisite majority of band members to hold a meeting to vote on the surrender proposal. Despite this failure, Graham assured his superiors that the issue would be addressed during the summer of 1924, when Laird would again be meeting with the Band to make treaty payments.[102]

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[99] Chief of the Swan River Band to DIA [date illegible], NA, RG 10, vol. 7544, file 29131-5, pt 1 (ICC Documents, pp. 155-56).

[100] W.M. Graham, Indian Commissioner, to D.C. Scott, Deputy Superintendent General, May 1, 1923, NA, RG 10, Vol.. 7544, file 29131-5, pt 1 (ICC Documents, p. 164).

[101] D.C. Scott, Deputy Superintendent General, to W.M. Graham, Indian Commissioner, May 15, 1923, NA, RG 10, vol. 7544, file 29131-5, pt 1 (ICC Documents, p. 165).

Laird's subsequent attempts to gather a quorum of the Swan River Band's voting members were also unsuccessful, however. As Graham reported in May 1926:

> In reply to Department letter 29,131-5 of 17th. instant I beg to say the last letter I received from the Acting Agent at Grouard [Laird] with reference to the proposed surrender of the Swan River Reserve No. 150E was dated 9th. January 1925. In that letter he stated that he could not get enough members of the Band together, even on Treaty Day, to hold a valid meeting but that he would attempt to do so at the earliest possible time which would be in May (1925). I have now written to enquire as to whether the meeting was held or not and if it was, with what result.[103]

It is interesting to note that, in concluding his report, Graham informed officials in Ottawa that he had "further instructed the Acting Indian Agent ... to make a serious attempt to get the Indians together and secure the surrender."[104] Despite Graham's commitment, it is evident that Laird was not able to arrange a surrender meeting during the treaty payment ceremonies in either 1926 or 1927. On December 15, 1927, nearly five years after the initiative had been proposed by J.L. Côté, Scott once again instructed Graham to have Laird continue his attempts:

> I have received your letter of the 10th instant ... stating that Agent Laird has not yet been able to obtain the desired information with regard to the proposed surrender of the Swan River Reserve No. 150 E. The circumstances are, of course, somewhat exceptional, but Mr. Laird should be advised to continue his efforts in the hope and expectation that at Treaty time next year he may be able to gather a sufficient number of the Indians together to discuss the matter in detail, and ascertain the wishes of the majority. Kindly request the Agent to keep the matter in mind.[105]

Thereafter, the Department's efforts to obtain surrenders of reserve lands in the Lesser Slave Lake Agency – including portions of the Swan River, Beaver, and Duncan's Band reserves – took on a more coordinated form. These efforts will be reviewed below following consideration of the events immediately preceding the surrenders of portions of the Beaver and Duncan's reserves.

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[102] W.M. Graham, Indian Commissioner, to D.C. Scott, Deputy Superintendent General, December 10, 1923, NA, RG 10, vol. 7544, file 29131-5, pt 1 (ICC Documents, p. 167).

[103] W.M. Graham, Indian Commissioner, to J.D. McLean, Secretary, DIA, May 26, 1926, NA, RG 10, vol. 7544, file 29131-5, pt 1 (ICC Exhibit 15, vol. 2).

[104] W.M. Graham, Indian Commissioner, to J.D. McLean, Secretary, DIA, May 26, 1926, NA, RG 10, vol. 7544, file 29131-5, pt 1 (ICC Exhibit 15, vol. 2).

[105] D.C. Scott, Deputy Superintendent General, to W.M. Graham, Indian Commissioner, December 15, 1927, NA, RG 10, vol. 7544, file 29131-5, pt 1 (ICC Exhibit 15, vol. 2).

Events Preceding the Surrender of Beaver Reserve IR 152 and 152A

During the spring of 1926, E.J. Martin, Secretary-Treasurer for the Municipal District of Fairview, Alberta, approached the Department to obtain "five acres from the south west corner of Indian Reserve No. 152" to straighten a dangerous section of highway and to secure a supply of gravel for construction purposes.[106] On receipt of this request, Indian Affairs' Secretary J.D. McLean asked Laird whether "such a surrender could be readily obtained" and, if so, the price at which the Agent thought the land could be sold.[107] Laird responded:

> I beg to report that a surrender of the land cannot be obtained easily at the present time.
>
> Three-fifths, at least, of the members of the Band do not reside on the Reserve, but live at some distance from it – south and west of Grande Prairie.
>
> At present the majority of the Indians are out hunting.
>
> I will not be able to meet the Dunvegan Beaver Indians until they come in to be paid at Treaty time, June 26th.
>
> Those Indians who are intimately interested in the surrender will not be in until later. These I will meet when I pay them on August 16th, at Grande Prairie.
>
> I cannot understand why any main highway from Peace River (Crossing) to Grande Prairie, (which must cross the Peace River at Dunvegan), should come nearer than two miles to the Reserve No. 152.
>
> The expense of taking this surrender will be out of all proportion to the present value of land required.[108]

Despite Laird's reservations, McLean informed Martin that the Department would eventually deal with the municipality's request, although it would be "some time before the question of surrender for the purpose of sale [could] be brought to their [the Band's] attention."[109]

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106 E.J. Martin, Secretary-Treasurer, Municipal District of Fairview, to Indian Affairs Department [sic], May 18, 1926, NA, RG 10, vol. 7544, file 29131-9, pt 1 (ICC Exhibit 15, vol. 2).

107 J.D. McLean, Assistant Deputy and Secretary, DIA, to H. Laird, Indian Agent, May 26, 1926, NA, RG 10, vol. 7544, file 29131-9, pt 1 (ICC Exhibit 15, vol. 2).

108 H. Laird, Acting Indian Agent, to J.D. McLean, Assistant Deputy and Secretary, DIA, June 2, 1926, NA, RG 10, vol. 7544, file 29131-9, pt 1 (ICC Exhibit 15, vol. 2).

109 J.D. McLean, Assistant Deputy and Secretary, DIA, to E.J. Martin, Secretary-Treasurer, Municipal District of Fairview, June 10, 1926, NA, RG 10, vol. 7544, file 29131-9, pt 1 (ICC Exhibit 15, vol. 2).

However, in light of the time constraints imposed by the seasonal nature of road construction, Martin urged the Department to reconsider the late-summer time frame suggested in its initial response:

> The Council desire me to urge for a speedy settlement of this matter. We have discussed the matter with the chief and a number of the Indians and they have expressed their willingness to agree to the sale and it would appear that they must be practically all now living on the reserve. When treaty money was recently paid to them I went to the reserve but Mr. Laird was not present and Mr. Schofield informed me he was unable to do anything.
>
> As stated in my letter of May 18th last, the Council would like to construct the roadway this summer if possible and we shall have the services of a surveyor who might not again be available for a considerable period, under which circumstances I would urge for an early decision.[110]

Given the apparent receptiveness of the Band to the proposal and the time constraints identified by the municipality, the Department prepared a "Description for Surrender" and surrender forms in July 1926.[111] The record does not disclose, however, whether Laird received these documents or any instructions to initiate surrender discussions with the Band.

In fact, the matter remained unaddressed until April 25, 1927, when Martin resubmitted the municipality's proposal.[112] Martin indicated that he had "received a letter from Hon. H. Greenfield in December last [1926], in which he informed me that a portion of this Indian reserve might be offered for sale in the near future."[113] The involvement of Herbert Greenfield, President of the Alberta Association of Municipal Districts, former Vice President of the United Farmers of Alberta (UFA), and former Premier of Alberta,[114] is evidence that, by 1927, interest in Indian reserve lands in the Peace River District was no longer confined to local groups or municipal governments and had attained new levels of political importance.

Comments made by J.C. Caldwell of Indian Affairs' Lands and Timber Branch support the same conclusion. Writing on May 16, 1927, Caldwell endorsed Laird's position that the proposed surrender of five acres from Beaver IR 152 would cost more money than the revenue that would be generated by the sale of such a small parcel of land. For this reason, he recommended that the proposal submitted by the Municipal District of Fairview be declined for the time being and that the municipality "be advised that it is not convenient for the Department to attempt to secure a surrender at the present time."[115] He concluded by noting that the lands in question were then being considered with a view to more widespread development:

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[110] E.J. Martin, Secretary-Treasurer, Municipal District of Fairview, to Secretary, Department of Indian Affairs, June 28, 1926, NA, RG 10, vol. 7544, file 29131-9, pt 1 (ICC Exhibit 15, vol. 2).

[111] See the "Description for Surrender" dated July 10, 1926, and the unsigned draft surrender document, NA, RG 10, vol. 7544, file 29131-9, pt 1 (ICC Exhibit 15, vol. 2).

[112] E.J. Martin, Secretary-Treasurer, Municipal District of Fairview, to J.D. McLean, Assistant Deputy and Secretary, DIA, April 25, 1927, NA, RG 10, vol. 7544, file 29131-9, pt 1 (ICC Exhibit 15, vol. 2).

[113] E.J. Martin, Secretary-Treasurer, Municipal District of Fairview, to J.D. McLean, Assistant Deputy and Secretary, DIA, April 25, 1927, NA, RG 10, vol. 7544, file 29131-9, pt 1 (ICC Exhibit 15, vol. 2).

[114] Herbert Greenfield was Premier of Alberta from August 1921 until November 1925, when he resigned from office and was succeeded by fellow United Farmers of Alberta (UFA) MLA J.E. Brownlee. See *The Canadian Encyclopedia*, 2nd ed. (Edmonton: Hurtig Publishers, 1988), 2:937.

> This Reserve No. 152, together with certain other small reserves in that district, may possibly be surrendered later for settlement purposes, providing suitable arrangements can be made with the owners, and subject to your approval, I would recommend that the present application be allowed to remain in abeyance.[116]

A handwritten notation on Caldwell's memorandum of May 16 confirms that Scott agreed with this recommendation.

Accordingly, the Department informed Martin that it "was not disposed to proceed further with the matter" owing to the expense involved, but that the proposal would be entertained at a future date should circumstances change:

> It may be that in the near future an attempt will be made to obtain the approval of the Indians to a surrender of the whole reserve, in order that it may be sold for settlement purposes, and if such action is taken, the application of your Municipality for this particular parcel will receive consideration.[117]

Interest in the proposed surrender and sale of Beaver IR 152 escalated during the fall of 1927 after the issue received exposure in the local newspapers.[118] Perhaps by coincidence, it was at this time that Laird submitted a report to the Department noting that the Beaver Band had also expressed an interest in pursuing the issue:

> I beg to report that, when paying Annuities, to the Dunvegan Beaver Indians, July 13th, last, the matter of a surrender of Reserve No. 152 was discussed.

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[115] J.C. Caldwell, Officer in Charge, Lands and Timber Branch, DIA, to D.C. Scott, Deputy Superintendent General, DIA, May 16, 1927, NA, RG 10, vol. 7544, file 29131-9, pt 1 (ICC Exhibit 15, vol. 2).

[116] J.C. Caldwell, Officer in Charge, Lands and Timber Branch, DIA, to D.C. Scott, Deputy Superintendent General, DIA, May 16, 1927, NA, RG 10, vol. 7544, file 29131-9, pt 1 (ICC Exhibit 15, vol. 2).

[117] A.F. MacKenzie, Acting Assistant Deputy and Secretary, DIA, to E.J. Martin, Secretary-Treasurer, Municipal District of Fairview, May 18, 1927, NA, RG 10, vol. 7544, file 29131-9, pt 1 (ICC Exhibit 15, vol. 2)

[118] Joe Johnston, Waterhole, Alberta, to unidentified recipient, October 3, 1927, NA, RG 10, vol. 7544, file 29131-9, pt 1 (ICC Exhibit 15, vol. 2).

> The Indians interested, expressed their willingness to surrender, all of the above Reserve, providing, the terms of surrender are satisfactory. In part lieu of, they wish to have set apart for them, 6 sections, situated in Township 87 Ranges 5 and 6 west of the 6th, Meridian.
>
> As I was unable to personally inspect the particular portion of land which they require, although knowing the country generally, I sent Mr. Duncan McDonald with Chief Neepee Pierre, (Pelly Law), who were accompanied by Mr. John C. Knott, as interpreter, to stake out and report upon the land desired.
>
> Mr. McDonald's report and sketch map is herewith enclosed.
>
> I beg also to report, that the Chief, Neepee Pierre, (Pelly Law), is also willing to surrender reserve No. 152 A. (Part of Green Island flat), which was surveyed for the late Neepee Chief and family, of whom he is the only surviving heir.[119]

Having received notice that the Band was interested in surrendering reserve land in exchange for other land, the Department was thereafter free to initiate more detailed surrender negotiations.

As noted above, the efforts to obtain surrenders of reserve lands in the Lesser Slave Lake Agency took on a more coordinated form in December 1927. These efforts will be reviewed below following consideration of the events immediately preceding the 1928 surrender by the Duncan's Band.

Events Preceding the Surrender of the Duncan's Band Reserves

In July 1925, Secretary-Treasurer E.L. Lamont of the Municipal District of Peace proposed to the Department of Indian Affairs that several Indian reserves in the Peace River District, referred to collectively by Lamont as "Indian Reserve No. 151," be surrendered and sold to permit additional settlement:

> The above Indian Reserves situated within the boundaries of this Municipal District have been unoccupied for many years and the few Indians left who were attached thereto have expressed a wish to surrender this land in accordance with the provisions of the Indian Act.
>
> For this purpose the remnant of the tribe have agreed to gather on Indian Reserve No. 151 A on the 10th August prox, which is the date arranged by your Dept. for the payment of their treaty allowance.
>
> As all the Indians interested are scattered over the country and it is difficult to get them together I would respectfully suggest that you instruct Mr. Harold Laird your Agent at Grouard, to have the necessary documents with him on that date, so that the assignment might be made in the proper manner.[120]

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[119] H. Laird, Acting Indian Agent, to Assistant Deputy and Secretary, DIA, October 20, 1927, NA, RG 10, vol. 7544, file 29131-9, pt 1 (ICC Exhibit 15, vol. 2).

[120] E.L. Lamont, Secretary-Treasurer, Municipal District of Peace, to Secretary, DIA, July 7, 1925, DIAND file 777/30-7-151A, vol. 1 (ICC Documents, p. 174).

Lamont's statement that "the few remaining Indians left who were attached thereto have expressed a wish to surrender this land" suggests that a number of band members had publicly declared their willingness to surrender portions of their reserve holdings. Accordingly, on July 15, 1925, the Department instructed Laird to meet with the Band to discuss the proposal. A month later, he reported the results of those discussions:

> I met most of the Indians interested in this reserve at Treaty Payment time, the 10th inst. and the question of selling it, and the other small Reserves belonging to the Band, was menti[o]ned.
>
> I gathered that they are willing to sell.
>
> This Reserve is used by them as a camping place except during the winter months. Part of it consists of fair agricultural land, the balance is sand mixed with gravel.
>
> At the present time land values in the district are extremely low.[121]

Based on this information, Indian Affairs' Officer in Charge of the Lands and Timber Branch recommended that the Acting Deputy Superintendent General should refrain from proceeding with the surrender as proposed until land prices increased:

> Recently the Secretary of the Municipal District of Peace, in the Province of Alberta, wrote the Department with respect to the question of surrender and sale of Indian Reserve No. 151. While it appears that the Indians are willing to surrender this particular reserve for sale, in view of the fact that the Agent reports that at the present time land values in the district are extremely low, I think it would be inadvisable to proceed further with the matter. There are no doubt plenty of other available lands in that district for settlement purposes, and unless and until the reserve property can be sold to advantage, I think the question of surrender should remain in abeyance.[122]

Accordingly, A.F. MacKenzie, the Acting Assistant Deputy and Secretary of Indian Affairs, advised Lamont that,

> with reference to Indian Reserve No. 151, acting Indian Agent Laird has recently reported that the Indians would be agreeable to sell this land, but the Department is not disposed to proceed further with the matter, in view of the fact that the present current land values in that district are very low. Should land prices increase to some

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[121] Harold Laird, Acting Indian Agent, to P.J. O'Connor, Acting in Charge Lands and Timber Branch, August 27, 1925, DIAND file 777/30-7-151A, vol. 1 (ICC Documents, p. 178).

[122] Officer in Charge, Lands and Timber Branch, DIA, to Acting Deputy Superintendent General of Indian Affairs, September 2, 1925, DIAND file 777/30-7-151A, vol. 1 (ICC Documents, p. 179).

> extent in the near future, the Department would be prepared to give the matter further consideration.[123]

The issue of surrender was revisited some months later when local interests approached the Minister of the Interior with yet another request to open up Indian lands within the Peace River District. In reporting on the circumstances at Peace River, Deputy Superintendent General Scott informed Charles Stewart, the Superintendent General of Indian Affairs and Minister of the Interior, that he was not satisfied with the timing of the proposed surrender:

> I return herewith certain documents which were handed to you by Rev. Mr. Macdonald, of Peace River, and with reference particularly to the question of opening up for settlement certain Indian Reserves in the Municipal [D]istrict of Peace, No. 857.
>
> The Reserves which are the subject of the attached correspondence are Nos. 151, 151A, 151B, 151C, 151D, 151E, and 151F, only the first two named being of any considerable size. It is true that these reserves are not utilized to advantage by the Indian owners, and possibly an agreement to surrender them for sale could be obtained if the matter was brought before the attention of the Indians. About a year ago Agent Laird reported to the Department that, when making treaty payments, he had discussed with the Indians the question of surrendering Reserve No. 151, which ... immediately adjoins the Village of Berwyn, and the Indians appeared to be willing to grant a surrender. However, as the Agent reported that land prices in that vicinity were extremely low, the Department considered it inadvisable to proceed further with the matter. It seems to me that if land prices are very low in this vicinity, plenty of farming lands must be available to purchase, and it would not be to the advantage of the Indian owners to dispose of their reserves at the present time.[124]

With this memorandum, consideration of the surrender proposal was once again placed in abeyance by the Deputy Superintendent General.

Notwithstanding this decision, Laird discussed the surrender proposal with the Band at treaty payment time during the summer of 1927. In his report of the July 14, 1927, meeting, Laird suggested that the impetus for reconsidering surrender may have come from certain members of the Band:

> I beg to report that, at a meeting of Duncan's Band, July 14th, 1927, on Reserve No. 151, I was requested to take up the matter with the Department, regarding the surren-

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[123] A.F. MacKenzie, Acting Assistant Deputy and Secretary, DIA, to E.L. Lamont, Secretary-Treasurer, Municipal District of Peace, September 3, 1925, DIAND file 777/30-7-151A, vol. 1 (ICC Documents, p. 180).

[124] D.C. Scott, DSGIA, to Superintendent General, DIA, November 25, 1926, DIAND file 777/30-7-151A, vol. 1 (ICC Documents, p. 181).

dering of several reserves, belonging to the Indians of the above named Band, as follows.–

No. 151.	3520.00	Acres
151. B.	294.00	"
151. C.	126.56	"
151. D.	91.65	"
151. E.	118.68	"
151. F.	131.02	"
151. G. (Approximate).	3.00	"
151. H.	160.00	"

Regarding Reserve No. 151.K. (surveyed for Wm. McKenzie and family), I beg to say, this land was not mentioned, as Mrs. Wm. McKenzie, widow of the late Wm. McKenzie, who is the only survivor, was not present at the meeting.

I also beg to say that, if these Reserves should be surrendered, the Indians of the Band, would still retain, Reserve No. 151.A. containing an area of 5120.00 acres.[125]

J.D. McLean, the Secretary and Assistant Deputy Superintendent General of Indian Affairs, replied on November 23, 1927:

Referring to your letter of the 21st ultimo, wherein you state that the members of Duncan's Band are apparently disposed to consider the surrender of a number of their reserves, given in your letter as Nos. 151, 151B, 151C, 151D, 151E, 151F, 151G, and 151H.

The Department is prepared to give consideration to the question of a surrender of these reserves for sale and settlement, but before proceeding further, it will be necessary to ascertain what terms and conditions the Band would be prepared to accept. With the exception, of course, of Reserve No. 151, the others are very small in area, and would not be worth very much. However, these could, together with 151, be offered for sale by public auction, if surrendered, and it might be that a reasonable price could be obtained for these lands if sold for farming purposes. That would depend, of course, upon the demand for such property in that particular district.

If the Indians are prepared to surrender these reserves, and to permit the Department to offer them for sale by public auction at some opportune time in the near future, we are prepared to go ahead with the matter. On the other hand, it may be that they have in mind some upset price or other condition which they would insist upon before granting a surrender. Your further report in the matter in order to clear up this particular phase of the situation is desired.[126]

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125 H. Laird, Acting Indian Agent, to Assistant Deputy and Secretary, DIA, October 21, 1927, DIAND file 777/30-8, vol. 1 (ICC Documents, p. 186).

126 J.D. McLean, Assistant Deputy and Secretary, DIA, to Harold Laird, Acting Indian Agent, November 23, 1927, DIAND file 777/30-8, vol. 1 (ICC Documents, p. 187).

Laird submitted a second report in December 1927, on this occasion speaking directly to the specific questions raised by McLean:

> Referring to Department letter of November 23rd, 1927. No. 27,131-8.
>
> I beg to state that at the meeting of the Band last July, the members interested, asked me what terms the Government would offer. In my reply I told them that I would submit the matter to the Department.
>
> The land in the vicinity is rapidly increasing in value and from sales made during the past summer, there is no doubt that a good price may be obtained for these Indian lands.
>
> I would suggest that the Indians be offered 25% of the net proceeds of the sales and yearly interest on the balance thereof.[127]

Laird's assessment of rising land values in the district seems to be borne out by correspondence dated May 15, 1928, from J.W. Martin, the Acting Commissioner of Dominion Lands, Department of the Interior, to inquiring settler R.A. Bunyan. In that correspondence, which was copied to Indian Affairs, Martin explained to Bunyan that there were no longer significant quantities of unoccupied dominion land in the district:

> With further reference to your ... inquiry respecting the possibility of purchasing land in the Peace River District ... I beg to say that no Dominion lands are at present available for purchase except in certain cases where small fractional areas of eighty acres or less are disposed of to the owners or homesteaders of lands lying immediately alongside.[128]

It appears that, as of December 1927, the Department's previous hesitance to undertake surrender negotiations with First Nations in the Lesser Slave Lake district until land prices had risen and "reserve property [could] be sold to advantage"[129] was no longer warranted, owing to the change in circumstances. As we have seen, the Department's efforts to obtain surrenders of reserve lands in the Lesser Slave Lake Agency took on a more coordinated format in December 1927.

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[127] Harold Laird, Indian Agent, to Assistant Deputy and Secretary, DIA, December 6, 1927, DIAND file 777/30-8, vol. 1 (ICC Documents, p. 188).

[128] J.W. Martin, Acting Commissioner, Dominion Lands Administration, Department of the Interior, to R.A. Bunyan, Waskatenau, Alberta, May 15, 1928, NA, RG 10, vol. 7544, file 29131-9, pt 1 (ICC Exhibit 15, vol. 2).

[129] Officer in Charge, Lands and Timber Branch, to Acting Deputy Superintendent General of Indian Affairs, September 2, 1925, DIAND file 777/30-7-151A, vol. 1 (ICC Documents, p. 179). A handwritten notation on the face of the document indicates that this memorandum was approved by Indian Affairs' Assistant Deputy and Secretary J.D. McLean. See also A.F. MacKenzie, Acting Assistant Deputy and Secretary, DIA, to E.L. Lamont, Secretary-Treasurer, Municipal District of Peace, September 3, 1925, DIAND file 777/30-7-151A, vol. 1 (ICC Documents, p. 180).

PREPARATIONS FOR THE SURRENDER OF RESERVE LANDS IN THE LESSER SLAVE LAKE AGENCY

From the foregoing, it can be seen that, between 1923 and 1927, the Department of Indian Affairs attempted to initiate surrender discussions with the Swan River Band for the surrender of IR 150E, the reserve that surrounded the town of Kinuso. The record further reveals that separate proposals for the surrender of reserve lands belonging to the Beaver and Duncan's Bands had been submitted by local municipal governments between 1925 and 1926, and that the question of surrender had been discussed with both these Bands during the summer of 1927. The result of these discussions, according to Agent Harold Laird, was that the two Bands were amenable to surrendering substantial amounts of their reserve holdings. Until this time, the Department had addressed each proposed surrender separately. However, after December 1927, it decided to coordinate the three initiatives into one concerted effort to negotiate surrenders from the Duncan's, Beaver, and Swan River Bands.

During the summer of 1927, Deputy Superintendent General Scott had discussed with members of the Alberta provincial cabinet a proposal for surrendering portions of several reserves belonging to bands in the Lesser Slave Lake/Peace River District.[130] The same proposal was submitted directly to the Superintendent General on December 20, 1927, when the Premier of Alberta, E.J. Brownlee, expressed an interest in the surrender and sale of various reserves in the same district, including the Duncan's IR 151 and 151A. In a memorandum dated December 29, 1927, to the Superintendent General, Scott considered Premier Brownlee's proposal:

> As requested, I have pleasure in submitting the following information with regard to the Indian Reserves mentioned in letter addressed to you by Hon. E.J. Brownlee, Premier of Alberta, and dated the 20th of this month.
>
> The question of the surrender and sale of the reserves enumerated by Hon. Mr. Brownlee was brought to my attention while in the West last fall, and since returning to Ottawa I have taken the matter up with the local officials for the purpose of securing some first-hand information.
>
> With regard to the Driftpile and Sucker Creek Reserves [of the Swan River Band], I may say that the local Agent, Mr. Harold Laird, of Grouard, reports that, while the Driftpile Reserve contains some excellent farming land, the Sucker Creek Reserve is quite unsuited for farming purposes....

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[130] D.C. Scott, DSGIA, to SGIA, December 29, 1927, DIAND file 777/30-8, vol. 1 (ICC Documents, pp. 189-91).

> Hon. Mr. Brownlee also mentions in his letter the reserves at Peace River Crossing, Nos. 151 and 151A, and the Beaver Reserve No. 152. I may say that I have already initiated action with the object of obtaining a release and surrender of a number of these small reserves in the Peace River district. Nine reserves are involved [IR 151 and 151A through 151H]....
>
> It is my intention to endeavor to secure a surrender of all these reserves, with the exception of 151A, which the Indians would in any case desire to retain as their common reserve. I understand from a report received recently from Mr. Laird, the Agent in charge, that the Indians would be willing to surrender these reserves, excepting 151A, providing some reasonable inducement is offered....
>
> When replying to Hon. Mr. Brownlee, you may assure him that these several matters are at present receiving every possible attention by the Department and that it is expected we shall be in a position shortly to place a number at least of these reserves on the market for sale and settlement.[131]

Eight weeks later, on February 23, 1928, the Department received yet another proposal for the surrender of these reserve lands. In a telegram to the Minister of the Interior, Herbert Greenfield, the former Premier of Alberta and the province's representative coordinating immigration from the British Isles, suggested that an organization in Britain was contemplating a program of assisted emigration to Alberta and was interested in arranging a block purchase of Indian lands located within the Peace River District:

> Group here considering movement of up to thousand families to Alberta, fifty families first year, increased numbers subsequent years. Are interested in Indian Reserve One fifty-one, One fifty-one A, One fifty-two, particularly latter. Parties are familiar with lands. Would you consider sale of one or all of these reserves? for non-profit settlement scheme organized and substantially backed by responsible people in England. Cable approximate price per acre.[132]

The Department's main difficulty with the scheme proposed by Greenfield was the stipulation that the lands be sold en bloc for the exclusive benefit of the families involved, since en bloc sales were generally contrary to departmental policy:

> From an administrative standpoint, it would, of course, be decidedly advantageous to dispose of these lands en bloc and for a stated cash consideration, but, on the other hand, there appears to be considerable local demand for the opening of these

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[131] D.C. Scott, DSGIA, to SGIA, December 29, 1927, DIAND file 777/30-8, vol. 1 (ICC Documents, pp. 189-91; ICC Exhibit 15, vol. 2).

[132] H. Greenfield, Government of Alberta, to Charles Stewart, Minister of the Interior, February 23, 1928, NA, RG 10, vol. 7544, file 29131-5, pt 1 (ICC Documents, p. 192).

> reserves for settlement, and the question is whether the sale of these lands in the manner indicated by Mr. Greenfield would be acceptable to the municipalities directly interested. It is not the desire of the Department, neither, I am sure, is it your wish, to take any action in this matter which would result in local dissatisfaction or criticism.[133]

Accordingly, the Department decided against the proposal, informing Greenfield on March 2, 1928, that it preferred that "Indian land be disposed of in usual way[,] namely public auction."[134]

On March 11, 1928, Scott replied to a February 6, 1928, memorandum from his Minister regarding a request advanced by L.A. Giroux, the provincial Member of the Legislative Assembly for the Athabasca-Grouard constituency, who was advocating the surrender and sale of the Driftpile, Swan River, Sucker Creek, and Sawridge Reserves on Lesser Slave Lake. Scott noted that he had deferred replying to the Minister's memorandum "as this whole matter was under consideration and we have now practically decided upon a definite course of action." Scott stated that the Department would, in the near future, "endeavor to obtain a surrender of the Swan River Reserve and the removal of the Indians now residing thereon to the Driftpile Reserve."[135] With respect to the Sawridge Reserve, he reported that the land was not acceptable for agricultural purposes and would not be sought by the Department. He added that, although no action would be taken regarding the Sucker Creek Reserve either, "there are a number of smaller Reserves in this Peace River section which it is our intention to try to offer for sale and settlement."[136] The reserves mentioned were the Duncan's IR 151, 151A, 151B, 151C, 151D, 151E, 151F, 151G, and 151H, as well as the Beaver Band's IR 152.

Charles Stewart, the Minister of the Interior and Superintendent General of Indian Affairs, replied to a similar inquiry dated May 26, 1928, from D.M. Kennedy, the Member of Parliament for West Edmonton, the focus of which was the Duncan's IR 151A. In response to this inquiry, Stewart informed Kennedy that a number of reserves in the Lesser Slave Lake Agency were being considered for surrender:

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[133] D.C. Scott, DSGIA, to SGIA, February 25, 1928, NA, RG 10, vol. 7544, file 29131-5, pt 1 (ICC Documents, pp. 193-94).

[134] Charles Stewart, Minister of the Interior, to H. Greenfield, London, England, March 2, 1928 (ICC Documents, p. 195).

[135] D.C. Scott, DSGIA, to Minister of the Interior, March 11, 1928, NA, RG 10, vol. 7544, file 29131-5, pt 1 (ICC Documents, p. 198).

[136] D.C. Scott, DSGIA, to Minister of the Interior, March 11, 1928, NA, RG 10, vol. 7544, file 29131-5, pt 1 (ICC Documents, pp. 198-99).

> You will be interested to learn that the Department is at present negotiating for the surrender of the Swan River Indian Reserve No. 150E and a number of smaller reserves in that district, which are known as Reserves 151, 151B, 151C, 151D, 151E, 151F, 151G, 151H and 151K. The total area of these reserves including Beaver and Swan River is 25,315 acres, and if successful in obtaining a release from the Indian owners, the sale of this quantity of land should prove of very great benefit to that portion of the country.[137]

It did not take long for word to circulate to the general public that Indian Affairs was preparing to secure a series of surrenders from Indians in the Lesser Slave Lake/Peace River District. As a result, a number of individuals from across the prairies wrote to the Department to find out when these lands would be available for sale. Having openly committed itself to the initiative, the Department broke with prior practice by subsequently informing applicants that surrenders were being pursued and that the lands would be sold at public auction to be advertised in advance.[138] From this time forward, the surrender proposal gained momentum. The technical process of surrendering these lands commenced on March 10, 1928, when Laird requested instructions from Ottawa on the proposed surrenders of the Duncan's Band reserves:

> I beg to say that the Indians of the above Band will be coming in shortly from their Winter's hunt and I shall no doubt, receive enquiries as to whether any action has been taken re[garding] the suggested surrender of their small reserves, therefore I would like to be informed if the Department is considering the matter of taking a surrender this coming Summer.[139]

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[137] Charles Stewart, Minister of the Interior, to D.M. Kennedy, MP, June 6, 1928, NA, RG 10, vol. 7544, file 29131-5, pt 1 (ICC Documents, p. 206)

[138] See D.C. Scott, DSGIA, to C.R. McIntosh, MP, March 20, 1928, NA, RG 10, vol. 7544, file 29131-9, pt 1 (ICC Exhibit 15, vol. 2); J.W. Martin, Acting Commissioner, Dominion Lands Administration, to R.A. Bunyan, Waskatenau, Alberta, May 15, 1928, NA, RG 10, vol. 7544, file 29131-9, pt 1 (ICC Exhibit 15, vol. 2). See also S.J.F. Pratt, Private Secretary, Minister of the Interior, to Robert Allan, Wembley, Alberta, July 7, 1928, NA, RG 10, vol. 7544, file 29131-9, pt 1 (ICC Exhibit 15, vol. 2); A.F. MacKenzie, Acting Assistant Deputy and Secretary, DIA, to J. Harris, August 20, 1928, NA, RG 10, vol. 7544, file 29131-5, pt 1 (ICC Documents, p. 219); A.E. Carlisle, Secretary, Peace River Board of Trade, to DIA, August 23, 1928, NA, RG 10, vol. 7544, file 29131-9, pt 1 (ICC Exhibit 15, vol. 2); P.J. O'Connor, Acting in Charge Lands and Timber Branch, DIA, to A.E. Carlisle, Secretary, Peace River Board of Trade, September 7, 1928, NA, RG 10, vol. 7544, file 29131-9, pt 1 (ICC Exhibit 15, vol. 2); P.J. O'Connor, Acting in Charge Lands and Timber Branch, DIA, to G. Lalonde, Vancouver, B.C., September 7, 1928, NA, RG 10, vol. 7544, file 29131-9, pt 1 (ICC Exhibit 15, vol. 2); P.J. O'Connor, Acting in Charge Lands and Timber Branch, DIA, to F.L. VanTroyen, Prince, Saskatchewan, September 7, 1928, NA, RG 10, vol. 7544, file 29131-9, pt 1 (ICC Exhibit 15, vol. 2); P.J. O'Connor, Acting in Charge Lands and Timber Branch, DIA, to Wm. Gaudette, Gravelbourg, Saskatchewan, September 15, 1928, NA, RG 10, vol. 7544, file 29131-5, pt 1 (ICC Exhibit 15, vol. 2).

[139] Harold Laird, Indian Agent, to Assistant Deputy and Secretary, DIA, March 10, 1928, DIAND file 777/30-8, vol. 1 (ICC Documents, p. 196).

On April 4, 1928, A.F. MacKenzie, the Acting Assistant Deputy and Secretary for Indian Affairs, advised Laird that "it is the intention of the Department to endeavour to secure a surrender this year" of IR 151 and 151B through 151H "in order that they may be placed on the market for sale for settlement purposes." MacKenzie continued:

> it is understood that Reserve No. 151A will be retained for use as a common reserve. This matter will at once receive further consideration, and the necessary surrender papers will be prepared to be forwarded to you some time later. In the meantime, you might indicate what would be the most suitable time to call a meeting of these Indians for the purpose of considering this matter.[140]

A week later, Laird proposed that August 6, 1928, "the date advertized for the payment of Annuities to the Indians interested in the small Reserves mentioned, would be a suitable date for a meeting of the Band."[141] With a tentative surrender meeting scheduled, Scott authorized the Department's Lands and Timber Branch to prepare the "necessary documents, etc., – to be forwarded well in advance, to the local Agent."[142]

In the weeks that followed, the Department decided that the task of negotiating surrenders from three bands in the Lesser Slave Lake Agency should be placed under the jurisdiction of a more senior officer than the Agent in the field. Writing on May 25, 1928, Commissioner Graham described the complexity of the situation with specific regard to the Swan River surrender:

> The Agent states that he will not be able to take the surrender until after his return from Wabasca on 19th June and I am of the opinion that it would be advisable to send an Inspector to take the surrender as I am doubtful of Mr. Laird's ability to further the interest of the Department in discussing terms with the Indians.
>
> There is the further consideration that the land surrendered should be fit for sale and that the amount paid to the Indians should be well within the sum for which the land could be sold. I am quite sure it will be advisable to send an Inspector to take the surrender and I shall be glad to hear from you as to whether a cash payment may be made to the Indians and if so, how much per head.[143]

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[140] A.F. MacKenzie, Acting Assistant Deputy and Secretary, DIA, to Harold Laird, Indian Agent, April 4, 1928, DIAND file 777/30-8, vol. 1 (ICC Documents, p. 200).

[141] Harold Laird, Indian Agent, to Assistant Deputy and Secretary, DIA, April 10, 1928, DIAND file 777/30-8, vol. 1 (ICC Documents, p. 201).

[142] Officer in Charge, Lands and Timber Branch, DIA, to DSGIA, April 19, 1928, DIAND file 777/30-8, vol. 1 (ICC Documents, p. 202). Scott's approval of the recommendation to take the surrender at the next payment of annuities is endorsed in a handwritten notation on the same document.

[143] W.M. Graham, Indian Commissioner, to D.C. Scott, DSGIA, May 25, 1928, NA, RG 10, vol. 7544, file 29131-5, pt 1 (ICC Exhibit 15, vol. 2).

In his response dated June 4, 1928, Scott agreed with Graham's suggestion, stating that "[w]hen the proper time comes upon which to approach the owners of this reserve with the proposition to surrender these lands for sale, I agree that possibly it would be best for you to send an Inspector from Regina for the purpose of conducting the negotiations."[144] Scott also related his views and instructions regarding the proposed surrenders of Swan River, Beaver, and Duncan's Band reserve lands, which the Department had by that time decided to address in a single concerted effort:

> In view of the apparent necessity for taking such action, I desire to bring to your attention in sufficient time so that you may make all necessary preparation, that it is the intention of the Department to endeavor to secure the surrender some time this year of Beaver Indian Reserve No. 152, and a number of smaller reserves in the same Agency, and which appear in our Schedule as Reserves Nos. 151, 151B, 151C, 151D, 151E, 151F, 151G, 151H and 151K. These small reserves and including both the Swan River and Beaver reserves comprise an area of 25,315 acres, and their release and sale by public auction should prove of very great advantage to that section of the country. I would suggest, therefore, that the submission of these surrenders should, if possible, be undertaken at the same time, by the Inspector, and in view of the number of reserves involved, and the distances between, it would undoubtedly be best for the Inspector to spend some time in this district, for the purpose of familiarizing himself with the situation and conditions, and in order that he may be able to advise the Department of the terms and conditions upon which the owners are prepared to release the larger reserves.[145]

Laird, who had to date acted as the Department's representative in all surrender discussions and proceedings within the Lesser Slave Lake Agency, was informed of the Deputy Superintendent's decision on June 12, 1928:

> It is the intention of the Department to endeavor to secure a surrender of Beaver Reserve this summer, and at the same time to obtain releases for sale of a number of small reserves in that district.... Negotiations are also under way with a view to having Swan Lake Reserve surrendered for a similar purpose, and this whole matter is of such importance that I have instructed Commissioner Graham, of Regina, to have one of his Inspectors visit this district this summer for the purpose of assisting you in conducting the preliminary negotiations, and if possible obtaining the consent of all the Indians involved to the release of the various properties.[146]

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[144] D.C. Scott, DSGIA, to W.M. Graham, Indian Commissioner, June 4, 1928, NA, RG 10, vol. 7544, file 29131-5, pt 1 (ICC Documents, pp. 203 and 213).

[145] D.C. Scott, DSGIA, to W.M. Graham, Indian Commissioner, June 4, 1928, NA, RG 10, vol. 7544, file 29131-5, pt 1 (ICC Documents, pp. 203 and 213).

[146] D.C. Scott, DSGIA, to H. Laird, Indian Agent, June 12, 1928, NA, RG 10, vol. 7544, file 29131-9, pt 1 (ICC Exhibit 15, vol. 2).

Notwithstanding the deferential tone of this correspondence, Laird was officially relieved of direct responsibility regarding the proposed surrenders of the Swan River, Beaver, and Duncan's Band reserve lands, his subsequent involvement being limited to assisting his senior colleague, the Inspector of Indian Agencies.

On assuming responsibility for supervising the Inspector who was about to depart for the Lesser Slave Lake Agency to negotiate the proposed surrenders, Graham wrote to Ottawa on June 19, 1928, to request more specific instructions:

> Before sending an Inspector into the district, I would be glad to have an outline from you as to the policy that the Department intend[s] to pursue in that district. What disposition is to be made of the Indians who may be occupying these smaller reserves? Are they to be amalgamated with other bands and if so, what arrangement would you suggest as a settlement with the Indians admitting them? It may be that a number of the Indians occupying some of these reserves would prefer to become enfranchised and if so, I think our officer should report along these lines.
>
> You will understand that it is a difficult matter to get these Indians together in order to treat with them. I have already taken this matter up with regard to the Swan River Band, and find that at the present time they are scattered all over the country – some working for the farmers, some on sections and others employed on the construction of the highway. All are more or less distant from the reserves so that when we do succeed in getting them together for the purpose of discussing terms of surrender with them, our officer should be very fully informed regarding the views of the Department.
>
> The land, as you state, could be sold by public auction and an upset price fixed after ascertaining the natural features of the land.[147]

On July 14, 1928, J.C. Caldwell of the Lands and Timber Branch forwarded to Graham draft surrender papers, along with a detailed letter of instruction setting out the policy and procedure to be followed with respect to the proposed surrenders of reserve lands:

> With regard to the proposed surrender of Beaver Indian Reserve No. 152, I may explain that the local Agent some time ago reported that the Indians owning this reserve, were prepared to surrender these lands on condition that they were allotted another reserve farther North.... If it is your intention to have Inspector Murison handle this question, you may inform him that he is at liberty to advise the Indian owners of the Beaver Reserve that the Department has purchased for them this new reserve,

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[147] W.M. Graham, Indian Commissioner, to D.C. Scott, DSGIA, June 19, 1928, NA, RG 10, vol. 7544, file 29131-5, pt 1 (ICC Documents, pp. 208-09).

> chosen by themselves and that these lands are now available for their use on the condition, however, that they agree to a release of their present reserve in order that the land may be sold for settlement purposes and for their benefit. Surrender papers in duplicate, providing for the surrender of the Beaver Reserve are enclosed herewith.
>
> Insofar as the Swan River Reserve is concerned, it appears from our Departmental records that you have already been advised in connection with this matter and know just what action should be taken.
>
> In a previous letter you were advised that it was the intention of the Department to try this year to obtain a release from the Indian owners of Reserves Nos. 151, 151B, 151C, 151D, 151E, 151F, 151G, 151H and 151K.... Surrender papers in duplicate, providing for the surrender of these reserves by the Peace River Crossing Band, except however, Reserves No. 151H and 151K, also accompany this letter. Separate and distinct releases must be obtained of the two last mentioned reserves and it is not possible for the Department to prepare the necessary documents as we are not quite positive of the present existing owners. I hope that this explanation and information will be sufficient for your purposes and in any case, I may again state that should Mr. Murison have an opportunity to review the previous exchange of correspondence with Agent Laird, he will be able to thoroughly grasp the situation....
>
> P.S. I have omitted to explain that from Agent Laird's letter of October 21st last, it appears that it is the intention of the present owners of Reserve 151 to 151K to move to and reside on Reserve No. 151A, which contains something over five thousand acres. You will see, therefore, that the surrender of the Reserve mentioned and dealt with in this letter does not mean that the Indians will be without a suitable place of residence.[148]

Additional instructions were issued the same day by Scott, who, by coincidence, was visiting Graham's office in Regina while conducting a tour of the Department's operations in western Canada. Scott addressed Graham's concerns regarding the difficulties experienced in past attempts to gather band members together for the purpose of conducting surrender meetings, suggesting that the consent of some Indians might be obtained individually rather than at a meeting of the eligible voters of a band as required by the *Indian Act*:

> I have suggested to Mr. Graham that under the peculiar local conditions we might accept the surrender if the consent of the Indians is obtained individually, or in groups, instead of at a meeting held under the provisions of the Act. If it were possible to obtain the consent of the majority of the voting members in this way, the Inspector might make an affidavit. You will remember in one or two cases we have

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148 J.C. Caldwell, In Charge, Land and Timber Branch, DIA, to W.M. Graham, Indian Commissioner, July 14, 1928 (ICC Documents, pp. 210-12).

> had to take surrenders which did not conform in all respects to the provisions of the Act, to H.M. in Council.[149]

Although there is no indication that Scott's suggestion was followed in the case of the Duncan's Band surrenders, this correspondence indicates that the Deputy Superintendent General of Indian Affairs was at least willing to depart from the technical requirements of the *Indian Act* to obtain the surrender of Indian lands in the Lesser Slave Lake Agency.

On July 30, 1928, Graham advised J.D. McLean, the Secretary of the Department, that he could not recommend a specific amount of money to be distributed to band members as an initial payment on the surrender of reserve lands. Graham also sought to clarify the name of the Duncan's Band:

> with reference to the proposed surrender of certain reserves in the Lesser Slave Lake Agency and an initial cash payment to the Indians, I have to state that it is not possible to recommend a definite amount, as this could not really be determined until we can decide what will be a fair valuation of the area to be surrendered and the number of Indians to be paid. I would suggest, however, that the Inspector who interviews the Indians should have authority to bargain, so that no delay may be experienced in taking the surrender or surrenders. In Department letter of the 14th July, it is stated that the reserves in question were set aside for the Peace River Crossing Band, and on reference to the pay-lists of the Lesser Slave Lake Agency I did not find the name of the Band recorded, and it is possible that Treaty Payments are made to members of this Band under some other name. Will you please advise me as to this.[150]

On receipt of this communication, McLean made final preparations for the surrender meeting with the Duncan's Band, and relayed the following information to Graham on August 9, 1928:

> The surrender papers which were sent you recently gave the name of the Peace River Crossing Band as the owners of these reserves, but treaty payments have not been made under this name, and it is possible that it would be better to substitute the name of Duncan Tustawits Band.... The reserves which, therefore, may be properly considered as the property of what is known as the Duncan Tustawits' Band are Reserves Nos. 151, 151A, 151B, 151C, 151D, 151E, 151F and 151G.... Additional copies of surrender forms are herewith, in order that the change in the name of the Band may be made.[151]

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[149] D.C. Scott, DSGIA, to J.C. Caldwell, In Charge, Land and Timber Branch, DIA, July 14, 1928 (ICC Documents, p. 214).

[150] W.M. Graham, Indian Commissioner, to Secretary, DIA, July 30, 1928 (ICC Documents, p. 216).

[151] J.D. McLean, Acting Deputy Superintendent General, to W.M. Graham, Indian Commissioner, August 9, 1928 (ICC Documents, p. 218).

The way had been paved for Inspector William Murison to conduct surrender meetings with the Swan River, Beaver, and Duncan's Bands. However, his first meeting – at Swan River on September 12, 1928 – proved inconclusive because a quorum of band members failed to materialize.[152] After obtaining surrenders from the Duncan's Band on September 19, 1928, and the Beaver Band on September 21, 1928, Murison returned to the Swan River reserve on September 26, 1928, at which time the Band's members voted to oppose the surrender proposal. However, as we have seen, the surrender by the Beaver Band was later challenged and accepted for negotiation by Canada, based, according to counsel for the Duncan's First Nation, on Murison's failure to convene a single surrender meeting and his record of two deceased band members having taken part in the surrender proceedings.

THE SURRENDER OF THE DUNCAN'S BAND IR 151 AND IR 151B TO 151G

On September 19, 1928, the Duncan's Band allegedly met and agreed to surrender IR 151 and IR 151B to 151G for sale to the Crown in right of Canada. Although the departmental correspondence with regard to events leading up the surrender is fairly detailed, there is little evidence about the surrender meeting itself. For present purposes, the Commission will set out whatever information can be gleaned from the available documents about the events related to the surrender meeting. The question of whether the surrender complied with the surrender provisions of the *Indian Act* will be addressed in Part IV of this report.

According to the daily journal entry of Agent Laird, he and Inspector Murison departed from Peace River Landing on the morning of September 19, 1928:

> Left in car for Reserves 151 and [sic] 152 with Inspector Murison at 8:30 a.m. Had lunch at [Berwyn] and reached Reserve No. 152 at 3:30. Took surrender of Reserve No. 151. Drove to hotel at Waterhole for night.[153]

Laird's entry for September 20, 1928, states that he and Murison "spent morning on Beaver Reserve No. 152." Finally, the entry for September 21,

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[152] William Murison, Inspector of Indian Agencies, to W.M. Graham, Indian Commissioner, October 2, 1928 (ICC Documents, pp. 249-52).

[153] "Lesser Slave Lake Indian Agency, Agent: Harold Laird" (ICC Exhibit 6, tab J). Excerpts from Indian Agent Harold Laird's diary, September 19, 1928.

1928, reads: "Spent most of day on Dunvegan and Beaver reserve taking surrender."[154]

Although Laird's account of the alleged surrender meeting with the Duncan's Band includes no significant details on the surrender meeting, such as who attended and what was discussed, Murison's report to Commissioner Graham, dated October 3, 1928, is somewhat more helpful, if still incomplete:

> I am submitting herewith a surrender which I obtained on the 19th of September from Duncan Tustawits Band of Indians, in Grouard Agency. Attached to the surrender is an affidavit taken by myself and the principal men of the band and also a list of the adult male members of the band over the age of 21 years. The surrender includes the following reserves:–

Peace River Crossing,	No. 151	containing	3520	acres
John Felix Tustawits,	No. 151B	"	294	"
Taviah Moosewah,	No. 151C	"	126.56	"
Alinckwoonay,	No. 151D	"	91.65	"
Duncan Tustawits,	No. 151E	"	118.68	"
David Tustawits,	No. 151F	"	134.02	"
Gillian Bell,	No. 151G	"	4.94	"

> These Indians were prepared for me and had evidently discussed the matter very fully amongst themselves, having been notified on August 3rd that an official would meet them some time later this year to take up the question of surrender with them. There are 53 members in this band, only 7 male members being of the full age of 21 years. 5 members out of the 7 were present and they were unanimous in giving their assent to the release of the above lands.
>
> They asked what they would get for the land, but this I was not able to inform them, but told them that it would be sold by public auction to the highest bidder which seemed to satisfy them. The second condition is that all monies received from the sale of the said lands would be placed to their credit and interest thereon paid to them annually on a per capita basis. Also that an initial payment of $50.00 be made to each member of their band on or before the 15th day of December, 1928. They also asked if a portion of the proceeds could be used in the purchase of stock, farm implements and building materials and I inserted a condition in the surrender covering this request.
>
> This is a small band and they appear to be decreasing. They have not been making use of the lands which they have surrendered. Reserve No. 151, comprising 3520 acres, is excellent farming land, largely open, level prairie with no waste land on it. There is a sparse growth of light poplar and willow, but there are large open tracts of prairie land as well. The land is free from pot holes and there are no lakes or sloughs

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[154] "Lesser Slave Lake Indian Agency, Agent: Harold Laird" (ICC Exhibit 6, tab J). Excerpts from Indian Agent Harold Laird's diary, September 20 and 21, 1928.

> on it. The village of Berwyn, on the Central Canada Railway, is situated in close proximity to the north west boundary. I would not be surprised to see this land bring an average of from twenty-five to thirty dollars per acre.
>
> This band are retaining Reserve No. 151A which comprises 5120 acres. I would say that at least 35% is open farming land and the balance is covered with a medium sized growth of poplar with open spaces here and there. There is a small lake called Old Wives Lake, with a creek running along at the south end of the reserve, as well as a spring, where water can be obtained. There are also some hay lands on the border of Old Wives Lake. This makes it a much more desirable reserve for Indians than the land which they have agreed to release. The village of Brownvale is situated about two miles from the north west corner of this reserve.
>
> It will be seen from the foregoing that ample provision has been made for this small band in retaining Reserve No. 151A, and after going carefully into the whole situation, it appears to me that it would be in their best interests if the Government can see fit to accept the surrender as it stands. The members of this band, in the past, have earned their living by hunting and working out for settlers and they have had no fixed place of abode. Some of them expressed a desire to settle down on their reserve and start farming, hence the request that provision be made to supply equipment for them.[155]

Graham in turn reported to Scott on October 6, 1928:

> With regard to your [letter] of the 4th June last, and Departmental letter of the 14th July, regarding the matter of obtaining surrenders of certain reserves in the Peace River country, I beg to inform you that I sent Mr. Inspector Murison up to deal with this matter early in September, and he has just returned after a most satisfactory trip. Separate reports and surrenders are attached hereto, in connection with the various reserves....
>
> It appears that Reserve No. 151, which contains 3520 acres, is very valuable land and should bring a good price. You will note what the Inspector says regarding Reserve 151A, which the Indians have retained for their own use, and which seems to be ample for their requirements.[156]

Murison forwarded the surrender document dated September 19, 1928, with his report. The surrender document provides a record of the specific terms under which the Duncan's Band apparently surrendered its reserves:

> KNOW ALL MEN BY THESE PRESENTS that We, the undersigned Chief and Principal men of the Duncan Tustawits Band of Indians ... acting on behalf of the whole people of

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[155] W. Murison, Inspector of Indian Agencies, to W.M. Graham, Indian Commissioner, October 3, 1928, NA, RG 10, vol. 7544, file 29131-5, pt 1 (ICC Documents, pp. 253-55).

[156] W.M. Graham, Indian Commissioner, to D.C. Scott, DSGIA, October 6, 1928, NA, RG 10, vol. 7544, file 29131-5, pt 2 (ICC Documents, pp. 263-65).

> our said Band in Council assembled, do hereby release, remise, surrender, quit claim and yield up unto our Sovereign Lord The King, his heirs and successors forever. All those parcels of land ... containing together by admeasurement four thousand two hundred and eighty-nine acres and eighty-five hundredths of an acre, more or less, being composed of and comprising all of the following Indian reserves,–
>
> [Descriptions of IR 151 and 151B to 151G]
>
> TO HAVE AND TO HOLD the same unto His said Majesty the King, his heirs and successors forever, in trust to sell by Public Auction the same to such person or persons and upon such terms as the Government of the Dominion of Canada may deem most conducive to our welfare and that of our people.
>
> AND upon the further conditions, namely;–
>
> 1. That all moneys received from the sale thereof shall be placed to our credit, and interest thereon paid to us annually on a per capita basis.
> 2. That an initial payment of Fifty Dollars shall be paid to each member of our Band on or before the Fifteenth day of December, in the year Nineteen Hundred and Twenty-eight.
> 3. That a portion of the proceeds of the sale of the said lands shall be used to purchase horses, cattle, farm implements and building materials for deserving members of our Band to such an amount and in such a manner as the Superintendent General of Indian Affairs may direct.[157]

The signatures of band members James Boucher and Eban Testawits, and the marks of fellow members John Boucher, Joseph Tustawits, and Emile Leg, appear on the document. Murison and Laird signed on behalf of the Department of Indian Affairs, with N. McGillivray and interpreter Charles Anderson executing the document as witnesses. Seals were affixed beside the signatures and marks of the five members of the Duncan's Band listed above.

An affidavit attesting to the validity of the surrender proceedings was sworn before and certified by William Dundas, a lawyer and notary public, on September 19, 1928, at Waterhole, a village located approximately 10 miles south of Fairview, Alberta.[158] The signatures of Eban Testawits and James Boucher, and the mark of Joseph Testawits, appear on behalf of the Band, while Murison signed for the Department. The relevant portions of the standard form document (with typewritten insertions shown in italics) read as follows:

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[157] Surrender of Indian Reserves Nos. 151, 151B, 151C, 151D, 151E, 151F, and 151G, September 19, 1928 (ICC Documents, pp. 257-60).

[158] It is interesting to note that W.P. Dundas was a member of the law firm hired by the Band in 1930 in an effort to compel the Department to fulfil the terms of surrender regarding the purchasing of agricultural implements. See G.N. Reddekopp, "The Creation and Surrender of the Beaver and Duncan's Band's Reserves," pp. 90-91 (ICC Exhibit 5).

> And the said *William Murison* for himself saith: –
>
> That the annexed release or surrender was assented to by a majority of the male members of the said band of Indians of the full age of twenty-one years entitled to vote, all of whom were present at the meeting or council.
>
> That such assent was given at the meeting or council of the said Band summoned for that purpose and according to its rules or the rules of the Department.
>
> That the terms of the said surrender were interpreted to the Indians by an interpreter qualified to interpret from the English language to the language of the Indians.
>
> That he was present at such meeting or council and heard such assent given.
>
> That he was duly authorized to attend such council or meeting by the Deputy Superintendent General of Indian Affairs.
>
> That no Indian was present or voted at said council or meeting who was not a member of the band or interested in the land mentioned in the said release or surrender.
>
> And the said *Eban Tustawits, James Boucher and Joseph Tustawits* say:–
>
> That the annexed release or surrender was assented to by them and a majority of the male members of the said band of Indians of the full age of twenty-one years.
>
> That such assent was given at a meeting or council of the said band of Indians summoned for that purpose as hereinbefore stated, and held in the presence of the said *William Murison*.
>
> That no Indian was present or voted at such council or meeting who was not a habitual resident on the reserve of the said band of Indians and interested in the land mentioned in the said release or surrender.
>
> That the terms of the said surrender were interpreted to the Indians by an interpreter qualified to interpret from the English language to the language of the Indians.
>
> That they are *Principal men* of the said band of Indians and entitled to vote at the said meeting or council.[159]

A voters' list showing the eligible voting members of the Duncan's Band and a record of the vote taken was appended to the affidavit (see Table 2). At the recommendation of the Superintendent General, the Governor in Council accepted the surrender of the Duncan's reserves. Order in Council PC 82 confirmed the surrender of the Duncan's Band IR 151 and IR 151B to 151G on January 19, 1929.[160]

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[159] Surrender Affidavit, September 19, 1928 (ICC Documents, p. 261).

[160] Superintendent General of Indian Affairs to Governor General in Council, January 7, 1929, NA, RG 10, vol. 7544, file 29131-5, vol. 1 (ICC Documents, pp. 285-86); Order in Council PC 82, January 19, 1929, file B-8260-145/A1-3 (ICC Documents, pp. 288-89).

TABLE 2
Duncan's Band, Peace River, Voters List

No.	Name	Present	Absent	For	Against
6	John Boucher	X		X	
36	Samuel Tustowitz		X		
37	Joseph Tustowitz	X		X	
39	Eban Tustowitz	X		X	
41	James Boucher	X		X	
42	Emilie [sic] Leg	X		X	
43	Francis Leg		X		
		5	2	5	

Certified Correct
[signed] W. Murison, Inspector

Source: "Duncan's Band, Peace River, Voters List," NA, RG 10, vol. 7544, file 29131-5, vol. 1 (ICC Documents, p. 262).

EVENTS FOLLOWING THE SURRENDER OF THE DUNCAN'S RESERVES

The record reveals that the second additional condition of the Duncan's Band surrender agreement, providing for an initial $50 per capita payment, was at least partially met. On October 16, 1928, department officials informed Commissioner Graham that a cheque for $9,900 was being forwarded to Laird to provide "payment on the basis of $7,200 to the Beaver Band, $2,650 to the Duncan Tustawits Band, and $50 to Mrs. William McKenzie."[161] Laird received the cheque on October 22, 1928.[162] In March 1929, Graham advised the Department that Laird had paid the Indians of the Beaver and Duncan's Bands $8,800 of the $9,900 forwarded to him, and Graham returned the balance of $1,100 to Ottawa.[163]

The surrender paylist indicates that Susan McKenzie of the Duncan's Band received her $50 payment on November 5, 1928, and that 44 other band members received payments totalling $2,200 two days later. Six children, all attending St Bernard's or St Peter's Schools at the time of payment, were credited with their respective $50 payments, which were apparently placed in trust for their benefit.[164]

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[161] DSGIA to W.M. Graham, Indian Commissioner, October 16, 1928 (ICC Documents, p. 273).

[162] J.D. McLean, DIA, to H. Laird, Indian Agent, October 18, 1928 (ICC Document, p. 274); W.M. Graham, Indian Commissioner, to Secretary, DIA, March 9, 1929, NA, RG 10, vol. 7544, file 29131-5, pt 1 (ICC Documents, pp. 316-18).

[163] W.M. Graham, Indian Commissioner, to Secretary, DIA, March 9, 1929, NA, RG 10, vol. 7544, file 29131-5, pt 1 (ICC Documents, pp. 316-18).

The surrendered Duncan's Band reserves were sold by public auction at Fairview on June 15, 1929, the terms of sale being "cash, or one-tenth cash and the balance in nine equal, annual instalments with interest at 6% on the unpaid purchase money."[165] The following excerpt from a newspaper article in the Peace River *Record* recounts the sale of the surrendered lands:

> With an attendance which more than taxed the capacity of the Gem theatre at Fairview, practically all of whom were concerned in the bidding, the sale of Indian lands held at Fairview on Saturday last fully equalled all expectations as to interest and bidding.
>
> The sale was conducted under the supervision of Harold Laird, Indian Agent, of Grouard, assisted by Chas. A. Walker and several officials from the Department of Indian Affairs at Ottawa. Opening at 10 o'clock Saturday morning, the selling continued until well after 6 o'clock in the evening, practically all of the land being sold. The only parcels not taken were a few scattered pieces to which buyers were not attracted by reason of sloughs or other undesirable topographical features.
>
> On the other hand, the bidding for the most part was brisk, with good prices. The reserve adjoining the townsite of Berwyn [IR 151] was sold out at an average price of between $17 and $18 per acre. One parcel went to J.B. Early at a price of $30 per acre, and another parcel of 264 acres immediately adjoining the townsite was secured by Jesse Smith at $22 per acre. The one quarter section of undesirable land in this reserve, consisting of the swamp and gravel pit on the one corner, will, it is understood, be purchased by the municipality for road purposes, as it is one of the few gravel supplies in this district.[166]

Inspector Murison, the senior departmental official administering the auction sale, submitted a detailed report to Commissioner Graham on June 20, 1929:

> I beg to forward herewith a Bank Draft in favour of the Receiver General drawn on the Bank of Commerce at Ottawa for $31,797.91 being the amount collected as a first payment on account of Indian Lands sold by Public Auction at Fairview, Alberta on the 15th instant....
>
> Altogether 153 parcels were offered. The land unsold includes one parcel in reserve No. 151, seventeen in No. 152, and all of reserves 151 C, 151 D, 151 F, 151 G, 151 H and 151 K.

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[164] "Paylist of First Advance Payment [to] Indians Re Surrender of Reserves Nos. 151, 151B, 151C, 151D, 151E, 151F and 151G," November 5 and 7, 1928 (ICC Exhibit 6, tab K).

[165] D.C. Scott, DSGIA, "Advertisement for Sale of Indian Lands," March 20, 1929, NA, RG 10, vol. 7544, file 29131-5, pt 1 (ICC Documents, p. 328).

[166] Peace River *Record*, "Buyers from Distant Points Attend Sale of Indian Lands," NA, RG 10, vol. 7544, file 29131-5, pt 2 (ICC Documents, p. 345).

> I had a number of enquiries and offers to purchase a quantity of the unsold lands two days after the sale at the upset price and referred them to the Department.[167]

The acreages of the Duncan's reserve lands sold on this occasion, the amounts collected at the auction for those lands (generally the 10 percent down payments), and the average price per acre (based on the full selling price) are summarized in Table 3.

TABLE 3

Duncan's Band Reserve Lands Sold, June 1929

Reserve No.	Acreage	Amount Collected	Average Price
151	3292	$5,730.29	$17.40
151B	294	$ 441.00	$15.00
151	118.68	$ 378.54	$30.00

Source: W. Murison, Inspector of Indian Agencies, to W.M. Graham, Indian Commissioner, June 20, 1929, NA, RG 10, vol. 7544, file 29131-5, pt 2 (ICC Documents, p. 342).

The remaining unsold Duncan's reserve lands, with the exception of IR 151K, were eventually sold on a case-by-case basis, with those interested applying directly to departmental headquarters. IR 151K never did sell, and was subsequently returned to the Band in 1965. The record in this inquiry does not include payment schedules for the various parcels of land sold by the Department on behalf of the Duncan's Band. Another specific claim regarding this issue was submitted to the Specific Claims Branch of the Department of Indian Affairs and Northern Development in February 1989.[168]

The record shows that a second per capita payment of $50 was made to the Duncan's Band in January 1930. Although the terms of surrender did not provide for the distribution of a second cash payment to the Band, such a payment was suggested as early as October 6, 1928, when Graham sent the Department copies of Murison's reports regarding the surrender of lands from the Beaver and Duncan's Band reserves:

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[167] W. Murison, Inspector of Indian Agencies, to W.M. Graham, Indian Commissioner, June 20, 1929, NA, RG 10, vol. 7544, file 29131-5, pt 2 (ICC Documents, p. 342).

[168] "The Administration of Indian Reserve Land Surrendered for Sale by Duncan's Band, 19-20 September 1928," submitted by Treaty and Aboriginal Rights Research, Indian Association of Alberta, February 13, 1989 (ICC Documents, pp. 605-33).

> I am also enclosing a surrender and report in connection with the following reserves belonging to the Duncan Tustawits Band of Indians.... The Indians made a complete surrender of these reserves, and they also asked for an initial payment of $50.00 per capita, to be made before December 15th, 1928, and that part of the purchase money be used to buy stock, farm implements, building materials, etc. It has occurred to me that although the surrender granted by this band only calls for an initial payment of $50.00, and no second payment, it might be in the interests of harmony and good feeling to arrange to give them a second payment at the same time the Indians of the Beaver Band are receiving theirs. They are practically all together as one band, and I fear it might cause dissatisfaction for one band to receive this additional payment and not the other. I would, therefore, ask that a payment of $50.00 per capita be given to this band also in 1929.[169]

The Department did not agree to Graham's request at that time. However, the following summer the Band apparently asked Murison to take up the issue of a second payment on its behalf. The Band's request is summarized in a report from Graham to the Secretary of Indian Affairs on July 17, 1929:

> Mr. Murison informs me that when he was in the Peace River district recently the Indians of the Duncan Tustawits and Beaver Bands asked that their second payment of $50.00 per capita be paid to them about August 16th.
>
> ... although the surrender only called for an initial payment of $50.00, the Beaver Band, who are their close neighbours, have a second payment of $50.00 provided for them. Mr. Murison informs me that the members of the Duncan Tustawits Band are looking forward to the second payment, and will no doubt be very disappointed if they do not receive the same treatment as the Beaver band. I trust the Department will act on my recommendation and forward the $50.00 for this Band as well.[170]

When this request for a second payment was also rejected by Indian Affairs in Ottawa, Graham wrote again on August 31, 1929:

> I regret that the Department does not see fit to provide for a second payment of $50.00 to the Duncan Testawits Band, putting them on the same terms with regard to the surrender as the Indians of the Beaver Band. The surrender was taken from the Duncan Testawits Band three days before that taken from the Beaver Band, and the former band was most reasonable to deal with. As these Indians are all living as one band it is going to cause permanent dissatisfaction if their request to have similar treatment to that given the Beaver Band is not granted. While I am aware there is nothing in the surrender that provides for this, the fact remains that they have made a

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[169] W.M. Graham, Indian Commissioner, to D.C. Scott, DSGIA, October 6, 1928, NA, RG 10, vol. 7544, file 29131-5, pt 2 (ICC Documents, pp. 264-65).

[170] W.M. Graham, Indian Commissioner, to Secretary, DIA, July 17, 1929, NA, RG 10, vol. 7544, file 29131-5, pt 2 (ICC Exhibit 6, tab H).

> strong request for it. If the Department required it the band would willingly sign a resolution.[171]

On October 29, 1929, Laird informed the Department that, when the surrenders were obtained in September 1928, the "members of the Duncan's Band understood then that they would be accorded the same treatment in the matter of payments as made the Beaver Band." He added that the Duncan's Band personally petitioned him in August 1929 "to endeavour to obtain for them a second payment of $50.00 each."[172] With this request, Laird forwarded to Ottawa a standard form resolution dated October 15, 1929, that purported to represent the wishes of a quorum of the Band's eligible voting members, as signified by the marks of John Boucher, Eban Testawits, Francis Leg, Joseph Testawits, and James Boucher:

> We the undersigned, Chief and Councillors of the *Duncan's* Band of Indians ... Do hereby, for ourselves, and on behalf of the Indian owners of the said Reserve, request that a sum not exceeding *Twenty-two Hundred* Dollars, be paid out of money standing to the credit of this Band, for the purpose of *Making a payment of FIFTY DOLLARS to each member of the Band as a second payment from funds received from the sale of Reserves Nos. 151, 151 B, and 151 E.*[173]

It should be noted that, although James Boucher and Eban Testawits signed their names in longhand to both the surrender and surrender affidavit in 1928, this document shows each of their endorsements or "marks" recorded with an "X."[174]

It appears that the Department gave the proposal serious consideration, as a handwritten marginal note dated November 7, 1929, on Laird's memorandum provided Deputy Superintendent General Scott with the following information:

> Under an O.C. I presume we could make this payment. The Band has passed a resolution.... The terms of surrender do not cover such a payment. The Band's capital

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[171] W.M. Graham, Indian Commissioner, to Secretary, DIA, August 31, 1929, NA, RG 10, vol. 7544, file 29131-9, pt 2 (ICC Documents, p. 348).

[172] Harold Laird, Indian Agent, to the Assistant Deputy and Secretary, DIA, October 29, 1929, NA, RG 10, vol. 7544, file 29131-5, pt 2 (ICC Exhibit 15, vol. 2).

[173] Duncan's Indian Reserve, October 15, 1929, NA, RG 10, vol. 7544, file 29131-5, pt 2 (ICC Exhibit 15, vol. 2). The italicized words represent typewritten additions to a pre-printed standard form document.

[174] The signature of James Boucher also appears on the September 20, 1928, Statutory Declaration regarding the surrender of IR 151H (ICC Documents, p. 256), and the June 14, 1943, surrender of IR 151K (ICC Documents, p. 480).

> stands at $7,108.90. The population of this Band is 50 so that it will require $2500.00 to make a per capita pay[men]t of $50.00.[175]

However, when the Department again rejected the request, Graham forwarded a final report on the subject to Ottawa on December 2, 1929:

> In July last, almost a year later, when Mr. Murison was in the district looking after the sale of the lands, the Duncan Tustawits Band made a request that they receive a second payment.... I reported this to you on July 17, and in your reply of the 9th August you pointed out that as the terms of the surrender did not provide for a second payment to those Indians the Department was unable to forward funds for this purpose. Feeling as I did that this would cause a lot of discontent I again wrote to the Department on August 31 ... and pointing out that the request was a reasonable one, as the two Bands were practically living as one. I presented my case as strongly as I could in this letter, and I then received a reply stating that under the Act this payment could not be made even with a resolution of the band.[176]

On December 10, 1929, Scott begrudgingly approved the second per capita payment of $50 to members of the Duncan's Band. However, he informed Graham that he was "at a loss to understand Mr. Murison's action in treating two Bands in the same locality in different manner," and he requested an explanation.[177] Graham replied:

> I note you state you are at a loss to understand Mr. Murison's action in treating two bands in the same locality in a different manner as to cash distribution, and that you would like to have his explanation. Mr. Murison has read your letter and he merely repeats what has been said before. He treated with the Duncan Tustawits Band on the 19th September and they agreed to accept a $50.00 payment. The Inspector completed the surrender papers and took the affidavits and so far as this band was concerned the matter was settled and they were satisfied with the terms. He then went over to the Beaver Band, whose reserve is situated eighteen miles from that of the Duncan Tustawits Band, and they refused to accept the terms which had been made with the Duncan Tustawits Band. Now the Inspector could very well have refused to take the surrender under these circumstances, but this was the last thing that entered his mind. The first request of this band was that they be given a prompt payment of $100.00, and the best bargain the Inspector could make was to agree to give them a payment of $50.00 down, and $50.00 at a later date, and as I explained to you, when

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[175] Unknown to D.C. Scott, DSGIA, November 7, 1929, NA, RG 10, vol. 7544, file 29131-5, pt 2 (ICC Exhibit 15, vol. 2).

[176] W.M. Graham, Indian Commissioner, to the Secretary, DIA, December 2, 1929, NA, RG 10, vol. 7544, file 29131-5, pt 2 (ICC Exhibit 15, vol. 2).

[177] D.C. Scott, DSGIA, to W.M. Graham, Indian Commissioner, December 10, 1929, NA, RG 10, vol. 7544, file 29131-5, pt 2 (ICC Documents, p. 351).

> the Duncan Tustawits Band heard of this they naturally wanted their deal re-opened, and I do not think the Inspector would have been justified in doing this.
>
> In my covering letter submitting these surrenders I pointed out that it might be in the interests of harmony to give these Indians a second payment of $50.00, and the Department informed me that this could not be done.[178]

The second payment was made on January 28, 1930, and thirteen days later Murison issued a report detailing the distribution of this money:

> I am enclosing herewith Pay Lists in triplicate in connection with the second payment to the Duncan Tustawits Band of Indians in the Lesser Slave Lake Agency on account of surrender of land in 1928....
>
> I left $500.00 with Mr. Laird for absentees who sent messages by their friends to have their money held for them. These instances are noted on the pay-list.
>
> The following is a statement of the payment,–

Received from Departmental Cheque	$2500.00
Paid 41 Indians at $50.00 each	2050.00
Balance returned to the Department	450.00
To be funded for school children	300.00
Total amount sent to Department	$750.00

> I will report further in connection with this Band under separate cover.[179]

The Department later informed Graham that it would "now be necessary for Mr Laird to send in receipts from the Indians to show that they received their money."[180] It is not possible to determine from the record before the Commission whether Laird complied with this request, but there is evidence that annual distributions of interest on the undistributed sale proceeds held in trust were made until at least 1939.[181]

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[178] W.M. Graham, Indian Commissioner, to Duncan C. Scott, DSGIA, December 14, 1929, NA, RG 10, vol. 7544, file 29131-5, pt 2 (ICC Exhibit 15, vol. 2).

[179] W. Murison, Inspector of Indian Agencies, to W.M. Graham, Indian Commissioner, February 10, 1930, NA, RG 10, vol. 7544, file 29131-5, pt 2 (ICC Documents, p. 354).

[180] A.F. MacKenzie, Acting Assistant Deputy and Secretary, February 18, 1930, NA, RG 10, vol. 7544, file 29131-5, pt 2 (ICC Documents, p. 359).

[181] Paylist Comparison Database (ICC Exhibit 15, vol. 1).

PART III

ISSUES

The Commission has been asked in this inquiry to determine whether Canada owes an outstanding lawful obligation to the Duncan's First Nation as a result of events surrounding the surrender of significant portions of the First Nation's reserve holdings in 1928. The parties agreed to frame the issues before the Commission in the following manner:

1 Did the surrender procedures meet the requirements of subsections 51(1) and 51(2) of the *Indian Act*?

2 Did the Crown meet its pre-surrender fiduciary obligations?

3 Was the decision of the Indians tainted by the conduct of the Crown in the pre-surrender proceedings?[182]

We will address these issues in the following section of this report.

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[182] Issues in this inquiry were confirmed by letter from R. David House, Associate Legal Counsel, Indian Claims Commission, to Perry Robinson, Legal Counsel, DIAND Legal Services, and Jerome Slavik, Ackroyd, Piasta, Roth & Day, November 6, 1997 (ICC file 2108-15-01).

PART IV

ANALYSIS

ISSUE 1 VALIDITY OF THE 1928 SURRENDERS

Did the surrender procedures meet the requirements of subsections 51(1) and 51(2) of the *Indian Act*?

Surrender Provisions of the 1927 *Indian Act*

The parties agree that the threshold issue in this inquiry is the interpretation of subsections 51(1) and (2) of the 1927 *Indian Act*, and specifically whether the Department of Indian Affairs complied with these statutory provisions in relation to the surrender of IR 151 and 151B through 151G.[183] Section 51 of the 1927 *Indian Act* prohibits the direct sale of reserve land to third parties and sets out the procedural requirements for a valid surrender of reserve lands.[184] Section 51 is reproduced below in its entirety:

> **51.** Except as in this Part otherwise provided, no release or surrender of a reserve, or a portion of a reserve, held for the use of the Indians of any band, or of any individual Indian, shall be valid or binding, unless the release or surrender shall be assented to by a majority of the male members of the band of the full age of twenty-one years, at a meeting or council thereof summoned for that purpose, according to the rules of the band, and held in the presence of the Superintendent General, or of any officer duly authorized to attend such council, by the Governor in Council or by the Superintendent General.
>
> 2. No Indian shall be entitled to vote or be present at such council, unless he habitually resides on or near, and is interested in the reserve in question.
>
> 3. The fact that such release or surrender has been assented to by the band at such council or meeting shall be certified on oath by the Superintendent General, or by the

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[183] For ease of reference, our analysis will refer to the surrender of IR 151 and IR 151B to 151G as the "1928 surrender," but this term will not include the surrenders of IR 151H and IR 151K. As we have already discussed, although the latter two surrenders also occurred in 1928, Canada has agreed to negotiate the First Nation's claim with regard to IR 151H, and IR 151K was eventually returned to the First Nation after Canada failed to sell it.

[184] *Indian Act*, RSC 1927, c. 98, s. 51.

> officer authorized by him to attend such council or meeting, and by some of the chiefs or principal men present thereat and entitled to vote, before any person having authority to take affidavits and having jurisdiction within the place where the oath is administered.
>
> 4. When such assent has been so certified, as aforesaid, such release or surrender shall be submitted to the Governor in Council for acceptance or refusal.[185]

In any case in which the validity of a surrender is put at issue, the Commission's first step must be to determine whether the technical requirements of the *Indian Act* regarding surrender have been fulfilled. These technical requirements were described by Estey J on behalf of the Supreme Court of Canada in *Cardinal v. R.*:

> It has also been argued that the interpretation which is now being considered is one which exposes the membership of the band to a risk of loss of property and other rights, contrary to the general pattern and spirit of the *Indian Act*. It is perhaps well to observe in this connection that there are precautions built into the procedures of Pt. I of the Act, dealing with surrender. Firstly, the meeting must be called to consider the question of surrender explicitly. It may not be attended to at a regular meeting or one in respect of which express notice has not been given to the band. Secondly, the meeting must be called in accordance with the rules of the band. Thirdly, the chief or principal men must certify on oath the vote, and that the meeting was properly constituted. Fourthly, only residents of the reserve can vote, by reason of the exclusionary provisions of subs. (2) of s. 49. Fifthly, the meeting must be held in the presence of an officer of the Crown. And sixthly, even if the vote is in the affirmative, the surrender may be accepted or refused by the Governor in Council. *It is against this background of precautionary measures that one must examine the manner in which the assent of eligible members of the band is to be ascertained under s. 49.*[186]

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[185] The surrender provisions of section 51 of the 1927 *Indian Act* trace their origin to the *Royal Proclamation of 1763*, RSC 1985, App. II, No. 1, which entrenched and formalized the process whereby only the Crown could obtain Indian lands through agreement or purchase from the Indians. The proclamation states:

> And whereas great Frauds and Abuses have been committed in purchasing Lands of the Indians, to the great Prejudice of our Interests, and to the great Dissatisfaction of the said Indians; In order, therefore, to prevent such irregularities for the future, and to the end that the Indians may be convinced of our Justice and determined Resolution to remove all reasonable Cause of Discontent, We do, with the Advice of our Privy Council strictly enjoin and require, that no private Person do presume to make any purchase from the said Indians of any Lands reserved to the said Indians, within those parts of our Colonies where, We have thought proper to allow Settlement; but that, if at any Time any of the Said Indians should be inclined to dispose of the said Lands, the same shall be Purchased only for Us, in our Name, at some public Meeting or Assembly of the said Indians, to be held for that Purpose by the Governor or Commander in Chief of our Colony respectively within which they shall lie ...

[186] *Cardinal v. R.*, [1982] 1 SCR 508, 13 DLR (4th) 321, [1982] 3 CNLR 3 at 10. Emphasis added. Estey J was dealing with section 49 of the 1906 *Indian Act* which, other than setting forth a more restricted list of persons authorized to take the surrender affidavit under subsection (3), was essentially identical to section 51 of the 1927 statute.

The first five of these criteria deal with a *band's* consent to the surrender of all or a portion of its reserve. The sixth criterion – the requirement of consent by the *Governor in Council* to the band's decision to surrender – will be discussed in the context of the statutory requirements for surrender, but also later in the context of determining whether the Crown fulfilled its fiduciary obligations towards the Duncan's Band.

In the event that we conclude that one or more of the foregoing criteria have not been satisfied on the facts of this case, another important issue for the Commission to consider will be whether the provisions of section 51 are *mandatory* or merely *directory*. If the provisions are mandatory and Canada did not comply with them, the surrender will be considered invalid; if they are directory and Canada did not comply, the surrender will be considered valid, although Canada may still be subject to other remedies.

Scott's Instructions to Indian Agents

Before turning to the statutory criteria relating to the consent of the Duncan's Band to the 1928 surrender, the Commission wishes to address a submission by the First Nation with regard to certain instructions delivered by Indian Affairs to its agents for taking surrenders of reserve land. These instructions, first prepared in 1913 by Deputy Superintendent General of Indian Affairs Duncan Campbell Scott, were issued by the Department as a guide to fulfilling the substantive and procedural requirements of the *Indian Act*. Framed in language that is similar, but not identical, to the surrender provisions in the *Indian Act*, the agents' instructions stated:

> 1. A proposal to submit to the Indians the question of the surrender of an Indian reserve or any portion thereof must be submitted by an officer of the Department for approval by the Superintendent General or his deputy, upon a memo setting forth the terms of the proposed surrender and the reasons therefor.
> 2. An officer duly authorized by the Superintendent General or his deputy to submit a surrender to the Indians shall for the purpose of taking such surrender make a voters' list of all the male members of the band of the full age of twenty one years who habitually reside on or near and are interested in the reserve in question.
> 3. The meeting or council for consideration of surrender shall be summoned according to the rules of the band which, unless otherwise provided, shall be as follows:
>
>   Printed or written notices giving the date and place of meeting are to be conspicuously posted on the reserve, and one week must elapse between the issue or posting of the notices and the date for meeting or council. The interpreter ... who is to be present and interpret at the meeting or council must deliver, if practicable, written or verbal notice to each Indian on the Voters' list not less than 3 days

> before the date of meeting, and must give sufficient reasons for the non-delivery of such notices.
>
> 4. The terms of the surrender must be interpreted to the Indians, and if necessary or advisable to individual Indians present at the meeting or council by an interpreter qualified to interpret the English language into the language or languages spoken by the Indians.
> 5. The surrender must be assented to by a majority of the Indians whose names appear upon the voters' list, who must be present at a meeting or council summoned for the purpose as hereinbefore provided.
> 6. The officer duly authorized shall keep a poll book and shall report the vote of each Indian who was present at the meeting or council and voted.
> 7. The surrender should be signed by a number of the Indians and witnessed by the authorized officer and the affidavit of execution to the surrender should be made by the duly authorized officer and the chief of the band and a Principal man or the Principal men before a judge, stipendiary magistrate or a justice of the peace.
> 8. The officer taking the surrender should report the number of voting members of the band as recorded in the voters' list, the number present at the meeting, the number voting for and the number against the surrender."[187]

The First Nation argues that Scott's instructions to his agents were not merely administrative conveniences, but in fact reflected the Crown's fiduciary obligations in the surrender context. The notice provisions of those instructions "were concentrated on being comprehensive, thorough, fair, well in advance with interpreters, with a proposal in hand that explained the terms of the surrender well in advance of a meeting."[188] Being obligations, the instructions were, in counsel's submission, mandatory and not discretionary.[189] The fact that the Crown failed to conduct itself in accordance with its own instructions constituted "strong evidence of a breach" of those obligations.[190]

The Crown responds that these instructions did not add anything to the surrender provisions of the *Indian Act* or constitute a second order of mandatory requirements to be superimposed on the statutory requirements of section 51. Moreover, the instructions did not expand on the fiduciary duties owed by Canada to a band in taking a surrender of reserve land. Counsel suggests that the instructions "were merely intended as practical guidelines to assist agents in carrying out the surrender provisions of the *Act* and can be viewed as internal instructions that contain, in essence, a partial job description for Indian Agents."[191]

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[187] Duncan Campbell Scott, DSGIA, "Instructions for Guidance of Indian Agents in Connection with the Surrender of Indian Reserves," May 15, 1916, NA, RG 10, vol. 7995, file 1/34-1-0 (ICC Exhibit 10, tab A)

[188] ICC Transcript, November 26, 1997, p. 214 (Jerome Slavik).

[189] ICC Transcript, November 25, 1997, p. 83 (Jerome Slavik).

[190] ICC Transcript, November 25, 1997, pp. 83-84 (Jerome Slavik).

The Commission notes that there is no indication in the instructions that they received legislative sanction by statute or regulation. Accordingly, we would be reluctant to imbue them with the force of law or to suggest that they imposed additional fiduciary obligations on the Crown, even if Scott had insisted that they be observed to the letter. In making this statement, we find support in the comments of McLachlin J in ***Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)*** (hereinafter referred to as the ***Apsassin*** case) to the effect that the courts should be careful not to impose requirements in addition to those set out in the provisions of the ***Indian Act***. In that case, McLachlin J considered whether trust principles should be applied to a 1945 surrender that, in the view of Gonthier J, amounted to a "variation of a trust in Indian land" created by an earlier surrender in 1940:

> The difficulties of applying trust principles directly to the ***sui generis*** Indian interest in their reserves point to the fact that it is better to stay within the protective confines of the ***Indian Act***. The 1927 ***Indian Act*** contains provisions which regulate in some detail the manner in which Indians may surrender their reserves or interests in their reserves to the Crown. The formal surrender requirements contained in the ***Indian Act*** serve to protect the Indians' interest by requiring that free and informed consent is given by a band to the precise manner in which the Crown handles property which it holds on behalf of the Band. The Act also recognizes the Indians as autonomous actors capable of making decisions concerning their interest in reserve property and ensures that the true intent of an Indian Band is respected by the Crown. No matter how appealing it may appear, this Court should be wary of discarding carefully drafted protections created under validly enacted legislation in favour of an ***ad hoc*** approach based on novel analogies to other areas of the law.[192]

We have also had regard for the decision of Killeen J of the Ontario Court of Justice (General Division) in ***Chippewas of Kettle and Stony Point v. Canada (Attorney General)***.[193] In that case, the plaintiff First Nation objected that its 1927 surrender meeting had been attended by A. MacKenzie Crawford who, during the course of the meeting, offered cash payments to the voting members to solicit their support for the surrender. The First

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[191] Written Submission on Behalf of the Government of Canada, November 17, 1997, p. 16.

[192] ***Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)***, [1995]4 SCR 344 at 395-96, [1996] 2 CNLR 25, 130 DLR (4th) 193, McLachlin J.

[193] ***Chippewas of Kettle and Stony Point v. Canada (Attorney General)***, [1996] 1 CNLR 54 (Ont. Ct (Gen. Div.)).

Nation argued that subsection 49(2) of the 1906 *Indian Act* had been violated because the provision, "by necessary implication, prohibits anyone other than the Indian Agent and qualified voters from being in attendance at the General Council meeting" called to consider a surrender. In rejecting this argument, Killeen J placed considerable emphasis on the provisions of the *Indian Act* and on Parliament's failure to expressly legislate to forbid the "direct dealings" claimed by the plaintiffs to be prohibited by necessary implication:

> As to the undoubted attendance of Crawford at the General Council meeting, I can find no support in the Royal Proclamation [of 1763] or s. 49(2) for an express or implied prohibition against that.
>
> The Royal Proclamation does not prohibit direct dealings per se. What it does is prohibit direct sales and interposes the presence of the Crown through the surrender procedure in an attempt to protect the Indians from the sharp and predatory practices of the past.
>
> It would have been easy for Parliament, if so-minded, to prohibit all direct dealings and, within s. 49(2), to prohibit the attendance of outsiders, including a prospective purchaser, at a surrender meeting. It chose not to do so and I find no warrant anywhere in the Royal Proclamation or the Act for virtually re-writing s. 49(2) such that it could be interpreted to prohibit direct dealing or attendance at the surrender meeting.
>
> Equally, I cannot conclude that the promises of the $15.00 direct cash payments and the distribution of $5.00 to each of the voters at the March 30 meeting violated s. 49(2) or any other provision of the Act.[194]

On appeal, this reasoning was subsequently adopted by Laskin JA of the Ontario Court of Appeal, who agreed that "the mere presence of Crawford at the meeting violated neither the language nor the rationale of the *Royal Proclamation* or s. 49 of the *Indian Act*."[195] He also agreed, however, that the cash payments had "an odour of moral failure about them" and might afford grounds for the plaintiff First Nation to make out a case of breach of fiduciary duty against the Crown.[196] We will return to the fiduciary aspects of these decisions later in this report.

It is also significant that Killeen J specifically addressed the Department's instructions to its agents, which were apparently reissued on February 13,

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[194] *Chippewas of Kettle and Stony Point v. Canada (Attorney General)*, [1996] 1 CNLR 54 at 87-88 (Ont Ct (Gen. Div.)).

[195] *Chippewas of Kettle and Stony Point v. Canada (Attorney General)* (1996), 31 OR (3d) 97 at 101-02 (Ont CA).

[196] *Chippewas of Kettle and Stony Point v. Canada (Attorney General)* (1996), 31 OR (3d) 97 at 106 (Ont CA).

1925. Although Killeen J concluded that Indian Agent Thomas Paul had followed the guidelines in that case, his comments are also instructive with regard to the status given to the instructions at law:

> *[T]he "Instructions" document* issued by the Department on February 13, 1925, *lays down guidelines for Indian agents incidental to surrender and sale* ... and it was followed by Paul in this case.
>
> Paragraph 3 of this document says this:
>
> > The meeting or council for consideration of surrender shall be summoned according to the rules of the band, which unless otherwise provided, shall be as follows: – Printed or written notices giving the date and place of the meeting are to be conspicuously posted on the reserve, and one week must elapse between the issue or posting of the notices and the date for meeting or council. The interpreter who is to be present and interpret at the meeting or council must deliver, if practicable, written or verbal notice to each Indian on the voters' list, not less than three days before the date of the meeting, or must give reasons for the non-delivery of such notices.
>
> This proviso calls for the summoning of a meeting or council in accordance with the rules of the Band and there is solid independent evidence that the calling of the General Council had the support of the Band and, especially, its Chief and councillors. On February 11, 1927, Chief John Milliken and three other councillors, Sam Bressette, Robert George and William George, wrote to the Department asking for a General Council meeting on an urgent basis. The letter says in part:
>
> > Please give us permission for to hold [sic] a general council as soon as possible, the majority of the voters are in favour of the sale of this land and are anxiously waiting for a general council.
> >
> > If the letters sent by Cornelius Shawanoo has [sic] any thing to do with the delaying of this sale please do not pay any attention to them. No doubt the most [sic] of his letters are fictions.
>
> In my view, it is inconceivable that such a request would have been made by the Chief and other senior members of the Band if there were a Band rule requiring a Band Council Resolution in every surrender case. *Even assuming that a Resolution were required, this letter is surely the practical equivalent of such a Resolution* and gives force to the calling of the General Council meeting on March 30.[197]

In these comments, Killeen J has recognized that the instructions were "guidelines ... incidental to surrender and sale," and he was prepared to view the Council's letter as the "practical equivalent" of a Band Council Resolution, assuming that one was required as part of the rules of the Band to request a surrender.

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[197] *Chippewas of Kettle and Stony Point v. Canada (Attorney General)*, [1996] 1 CNLR 54 at 84-85 (Ont. Ct (Gen. Div.)). Emphasis added.

In our view, these comments underscore the conclusion that Scott's instructions to his agents were merely intended to provide practical assistance in implementing the statutory provisions, but did not create an additional standard of compliance over and above the requirements of the *Indian Act*. Moreover, although it is obvious from Laird's report of his attempt to gather the Beaver Band for a surrender meeting in 1923 that he was fully aware of Scott's instructions,[198] it is equally obvious from his failure to convene the 1923 meeting that those instructions were impractical and inappropriate with respect to the circumstances of far-flung bands such as the Beaver and Duncan's Bands. Nevertheless, the instructions may be relevant to this inquiry for at least two purposes. First, if one of the surrender provisions of the *Indian Act* should be found to be ambiguous, then the instructions may provide relevant extrinsic evidence to assist in interpreting the meaning and effect of that provision. Second, evidence demonstrating a marked and substantial departure from these instructions on the part of the Crown's agents in obtaining a surrender may be relevant for the purposes of determining whether the Crown has fulfilled its fiduciary obligations in the pre-surrender context. Therefore, the agents' instructions may provide important evidence regarding the standard of "due diligence" to which the Crown expected its representatives to adhere, and to that extent may be relevant in determining whether the Crown discharged its fiduciary duties to the Duncan's Band in obtaining the 1928 surrender.

As we have already noted, we will return to the fiduciary aspects of this claim later in our report. We will now address the surrender provisions of the *Indian Act*, starting with the general principles of interpretation developed by the courts to guide us in this endeavour.

Principles of Interpretation

To the extent that questions of interpretation arise in determining the meaning and effect of section 51, it is important to bear in mind the following three principles enunciated by the Supreme Court of Canada which provide the jurisprudential context within which the surrender provisions must be considered. First, the oft-quoted principle from *Nowegijick v. The Queen* provides that "treaties and statutes relating to Indians should be liberally construed and doubtful expressions resolved in favour of the Indians."[199] Second, Justice Major in *Opetchesaht Indian Band v. Canada* made the following statement with regard to the underlying purpose and theme of the surrender provisions: "Both the common law and the *Indian Act* guard against the erosion of the native land base through conveyances by individual band members or by any group of members."[200] Third, section 51 is the sole statutory protection afforded to a band to ensure that the goals and choices of its members with respect to the disposition of their lands are honoured. As McLachlin J stated in *Apsassin*, "[t]he basic purpose of the surrender provisions of the *Indian Act* is to ensure that the intention of Indian bands with respect to their interest in their reserves be honoured."[201]

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[198] H. Laird, Acting Indian Agent, to DIA, September 10, 1923, NA, RG 10, vol. 7544, file 29131-9, pt 1 (ICC Exhibit 15, vol. 2).

The second and third of these principles are aptly summarized in the further statement by McLachlin J in *Apsassin* that

> the *Indian Act*'s provisions for surrender of band reserves strikes a balance between the two extremes of autonomy and protection. The band's consent was required to surrender its reserve. Without that consent the reserve could not be sold. But the Crown, through the Governor in Council, was also required to consent to the surrender. The purpose of the requirement of Crown consent was not to substitute the Crown's decision for that of the band, but to prevent exploitation. As Dickson J. characterized it in *Guerin*[202] (at p. 383):
>
> > The purpose of this surrender requirement is clearly to interpose the Crown between the Indians and prospective purchasers or lessees of their land, so as to prevent the Indians from being exploited.
>
> It follows that under the *Indian Act*, the Band had the right to decide whether to surrender the reserve, and its decision was to be respected. At the same time, if the Band's decision was foolish or improvident – a decision that constituted exploitation – the Crown could refuse to consent. In short, the Crown's obligation was limited to preventing exploitative bargains.[203]

It is against this backdrop of balancing autonomy and protection that we now turn to the specific terms of section 51. We will deal first with the issues relating to the surrender meeting – whether there was a meeting in the first place and, if so, whether that meeting was summoned for the specific purpose of dealing with the surrender, and whether it was summoned according to the rules of the Band.

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[199] *Nowegijick v. The Queen*, [1983] 1 SCR 29 at 36.

[200] *Opetchesaht Indian Band v. Canada*, [1997] 2 SCR 119 at 144, Major J. Major J finds support for this conclusion in the reasoning of McLachlin J in *Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)*, [1995] 4 SCR 344 at 370, [1996] 2 CNLR 25, 130 DLR (4th) 193, McLachlin J.

[201] *Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)*, [1995] 4 SCR 344 at 391, [1996] 2 CNLR 25, 130 DLR (4th) 193, McLachlin J.

[202] *Guerin v. The Queen*, [1984] 2 SCR 335.

[203] *Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)*, [1995]4 SCR 344 at 370-71, [1996] 2 CNLR 25, 130 DLR (4th) 193, McLachlin J.

We will then address questions of voter eligibility, identifying those male members of the Band at least 21 years of age who were "habitually resident on or near, and interested in the reserve in question." In doing so, we will determine whether any ineligible Indians attended or voted at the alleged meeting of September 19, 1928.

Next, we will consider the issues relating to consent: whether the surrender meeting was attended by a quorum of voting members, whether the surrender was approved by a sufficient number of those voting members, and whether the Governor in Council properly consented to the surrender. At that point, before turning to the second set of issues relating to the Crown's fiduciary obligations to First Nations, we will draw our conclusions as to whether the provisions of section 51 of the *Indian Act* were satisfied. Finally, if any of those provisions were *not* satisfied, we will consider whether the provisions of section 51 were mandatory (implying that the surrender was invalid if they were not met) or merely directory (thus validating the surrender, but perhaps exposing Canada to other forms of relief in favour of the First Nation).

Was There a Meeting?

The First Nation submits that the first criterion not fulfilled by Canada was the requirement to convene a meeting to consider the surrender. It will be recalled that the first subsection in section 51 of the 1927 *Indian Act* states:

> **51.** Except as in this Part otherwise provided, no release or surrender of a reserve, or a portion of a reserve, held for the use of the Indians of any band, or of any individual Indian, shall be valid or binding, unless the release or surrender shall be assented to by a majority of the male members of the band of the full age of twenty-one years, at a meeting or council thereof summoned for that purpose, according to the rules of the band, and held in the presence of the Superintendent General, or of any officer duly authorized to attend such council, by the Governor in Council or by the Superintendent General.

The First Nation challenges the 1928 surrender on the basis that, in obtaining the ostensible consent of the Duncan's Band to the surrender, Canada failed to comply with a number of the criteria in this subsection and subsection (2). In the First Nation's submission, the effect of such failures, individually and cumulatively, is to render the surrender invalid or void *ab initio* (i.e., from the outset).

Counsel contends that a properly convened meeting or council pursuant to section 51 is fundamental and crucial to the validity of a surrender for a number of reasons:

- subsection (1) ensures that the decision-making process is culturally compatible with the band's traditional processes by referencing the band's practices and rules;
- a surrender meeting provides an open, transparent forum where all information and points of view can be shared and debated, thereby allowing a collective decision rather than a private one reflecting only individual or factional interests;
- since subsection (2) excludes certain band members deemed to be ineligible for voting purposes, the meeting process is protected from being tainted by outside influences, including non-resident and disinterested members; and
- because the meeting provides an open forum for the Indian agent to fully and carefully explain the transaction and the band's alternative options, it represents the best means of ensuring the collective informed and voluntary consent of a majority of eligible voters to the surrender.[204]

For these reasons, the First Nation submits that the surrender meeting represents a primary safeguard for a band against an exploitative bargain, and that full documentation of the meeting is an equally significant safeguard for Canada:

> From the record of such a meeting the Crown can fully demonstrate through its conduct that it is acting in the best interests of Indians and not proceeding merely to pursue its own political and financial interests. In our view, failing to keep a clear record showing full compliance with this requirement, raises doubts and uncertainty as to the occasion and manner of compliance. And we believe that such doubts should be resolved in favour of the Indians. It also raises the presumption that the Department may have been acting in its own interests and pursuing its own agendas.[205]

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[204] Written Submission on Behalf of the Duncan's First Nation, November 12, 1997, pp. 44-45; ICC Transcript, November 25, 1997, pp. 87-88 (Jerome Slavik).

[205] ICC Transcript, November 25, 1997, p. 89 (Jerome Slavik).

The Commission agrees with the First Nation's submissions regarding the purposes of surrender meetings. It seems clear that a properly conducted surrender meeting has most, if not all, of the advantages enumerated by counsel for the First Nation, and even Canada is likely to agree that full records of surrender proceedings conducted by it would, in retrospect, have made it easier for the parties to determine whether the requirements of the statute had been met. However, it is our view that the evidence in this case does not require us to make the sort of presumption or negative inference that the First Nation proposes.

With regard to the merits of whether a meeting actually happened, the First Nation points to a number of facts or allegations that, in its submission, demonstrate that the surrender meeting of September 19, 1928, was fabricated. Counsel submits that, although Inspector Murison claimed that the meeting took place, he failed to disclose its location, date and time, the individuals with whom he met, the substance of the discussions, and how or if a vote was conducted.[206] Agent Laird's diary is, it is suggested, similarly inconclusive.[207] Contending that most of the individuals on the voters' list did not live near the reserve, the First Nation submits that they were probably away on their winter hunts and likely did not attend any such meeting.[208] In fact, since Scott had expressed the Department's willingness, owing to difficulties in assembling the bands, to permit surrenders in the Lesser Slave Lake Agency to be signed by individuals or small groups, it is possible, submits counsel, that such one-to-one meetings were used to obtain the Duncan's surrender, just as they were for other bands in the area.[209] At the very least, it was "unusual for Indians residing near or interested in a reserve to attend a meeting some 30 miles away" – assuming, as the parties agreed,[210] that the surrender was taken at IR 152 – to surrender their reserves.[211]

The First Nation also finds reason for suspicion in the actual surrender documents. First, the signatories to the surrender were different from those who signed the certifying affidavit, and the marks made for those individuals who signed both documents likewise differed from one document to the other. According to counsel, these facts suggest that the marks were not made by the Indian "signatories" at all and were, in fact, forged.[212]

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[206] Written Submission on Behalf of the Duncan's First Nation, November 12, 1997, p. 23; ICC Transcript, November 25, 1997, pp. 23 and 53 (Jerome Slavik).

[207] Written Submission on Behalf of the Duncan's First Nation, November 12, 1997, p. 24.

[208] Written Submission on Behalf of the Duncan's First Nation, November 12, 1997, p. 36.

[209] Written Submission on Behalf of the Duncan's First Nation, November 12, 1997, pp. 18-19.

[210] Jerome N. Slavik, Ackroyd, Piasta, Roth & Day, to Ron Maurice, Indian Claims Commission, Bruce Becker, Specific Claims, DIAND Legal Services, and François Daigle, Department of Justice, May 16, 1997 (ICC Exhibit 13).

[211] ICC Transcript, November 25, 1997, p. 53 (Jerome Slavik).

Second, relying on evidence indicating that the surrender documents may have been prepared some months in advance of the meeting, counsel submits that, since no changes were made to those documents in obtaining the surrender, this invites an inference that no discussions or surrender meeting occurred at all;[213] assuming that the Band proposed the surrender, as argued by Canada, it was just as ***likely*** that the Band would have placed terms, questions, demands, or comments regarding the surrender before Murison as it was ***unlikely*** that a pre-printed affidavit could accurately describe the events of a later surrender meeting, absent changes on the face of the surrender documents.[214] It was particularly surprising that no changes or comments were forthcoming, given, based on the evidence of elder John Testawits, that a number of band members were opposed to surrendering the reserves.[215] The more probable scenario, argues counsel, is that the additional terms of the surrender documents were designed in advance to act as inducements to surrender.[216]

Third, the First Nation questions whether the jurat – the portion of the surrender affidavit indicating that an illiterate person has had the contents of the affidavit read to him and that he understands them – was properly prepared. According to counsel, such a failing "would in today's terms severely undermine the view that an illiterate person in the first instance and one who could not speak English well or at all in the second instance understood the contents of the document they were alleging to be the truth."[217] Compounding this shortcoming, in the First Nation's view, is a lack of evidence that the affidavit was translated to its Indian signatories or that its key terms, such as "entitled to vote," "residing on or near," and "interested in the reserve," were explained to them.[218] Arguing that even the Crown was reluctant to place much reliance on Murison's documents relating to the surrenders of IR 151H or the Beaver Band's IR 152, the First Nation questions why his documentation of the 1928 surrender of IR 151 and IR 151B to 151G should be accorded more weight.[219]

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[212] Written Submission on Behalf of the Duncan's First Nation, November 12, 1997, pp. 24 and 36.

[213] Written Submission on Behalf of the Duncan's First Nation, November 12, 1997, p. 22; ICC Transcript, November 25, 1997, p. 50 (Jerome Slavik).

[214] Written Submission on Behalf of the Duncan's First Nation, November 12, 1997, p. 36.

[215] ICC Transcript, November 25, 1997, p. 53 (Jerome Slavik).

[216] ICC Transcript, November 25, 1997, p. 45 (Jerome Slavik).

[217] ICC Transcript, November 26, 1997, p. 203 (Jerome Slavik).

[218] ICC Transcript, November 26, 1997, pp. 203-04 (Jerome Slavik).

Finally, the First Nation relies heavily on the evidence of elder John Testawits in relation to his discussions with now-deceased members of the Band regarding the occurrence of a meeting. John Testawits stated that he had been told by his uncle, Samuel Testawits, that the only meeting which took place involved Samuel, John's aunt Angela (Joseph Testawits's wife), his aunt Angelique (David Testawits's widow), and an Indian agent named L'Heureux. Apparently the three Indian participants advised the agent that, since only the three of them were in attendance, the Band was not sufficiently represented to make a decision, and they did not want to surrender the reserve in any event.[220] This meeting evidently took place in the late summer or early fall when many of the men were putting up hay near Bear Lake.[221]

Joseph Testawits informed John Testawits that he was at Spirit River when this meeting took place, that he never attended a meeting to discuss surrendering reserve land, and that he was angered to discover on his return that such a meeting had taken place.[222] Similarly, James Boucher informed John Testawits that he never attended a surrender meeting, agreed to a surrender, or signed a surrender document, nor did he recall his father, John Boucher, doing so.[223] The First Nation argues that it would be unusual for such an important event to occur with band members having no memories of it.[224] In summary, counsel likened the surrender in this case to that considered by the Commission in the Moosomin inquiry, where there was also considerable uncertainty regarding the occurrence of a meeting.[225]

Canada's response to these arguments is that, while a precise time and location of the September 19, 1928, surrender meeting cannot be determined, the documentary evidence clearly demonstrates that a meeting took place for the purpose of the Band deciding whether to surrender some of its reserves.[226] The surrender affidavit, Murison's report, and Laird's diary all indicate that a meeting was held,[227] and Laird's letter of October 29, 1929, enclosing the Band's petition for the second payment of $50 – in which he referred to "a majority of the members of this Band [being] present on the Beaver Reserve No. 152 when surrenders were taken from both Bands" – provides further corroboration of the meeting's existence.[228] Even more compelling, however, in Canada's submission, is the evidence of Angela Testawits, who, in a 1973 interview, recalled: "I was standing right there when they [the reserves] were sold because it was my old man [Joseph Testawits] who sold them."[229] Moreover, according to counsel, the fact that the surrender may have been held on IR 152 is neither surprising nor meaningful, since there was no statutory requirement for the location of a surrender meeting, and the members of the Duncan's Band often assembled at Fairview in any event to receive their treaty payments.[230]

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[219] ICC Transcript, November 26, 1997, pp. 201-02 (Jerome Slavik).

[220] Written Submission on Behalf of the Duncan's First Nation, November 12, 1997, pp. 26 and 35-36; ICC Transcript, November 25, 1997, pp. 62-65 (Jerome Slavik); Statutory Declaration of John Testawits, December 3, 1991, p. 5 (ICC Exhibit 10, tab A, Schedule 4; ICC Exhibit 10, tab B, Schedule 7).

[221] Statutory Declaration of John Testawits, December 3, 1991, p. 5 (ICC Exhibit 10, tab A, Schedule 4, ICC Exhibit 10, tab B, Schedule 7).

[222] Written Submission on Behalf of the Duncan's First Nation, November 12, 1997, p. 27; ICC Transcript, November 25, 1997, pp. 66-68 (Jerome Slavik); Statutory Declaration of John Testawits, December 3, 1991, pp. 5-6 (ICC Exhibit 10, tab A, Schedule 4; ICC Exhibit 10, tab B, Schedule 7).

[223] Statutory Declaration of John Testawits, December 3, 1991, p. 10 (ICC Exhibit 10, tab A, Schedule 4, ICC Exhibit 10, tab B, Schedule 7).

[224] ICC Transcript, November 25, 1997, pp. 64-65 and 67 (Jerome Slavik).

[225] Written Submission on Behalf of the Duncan's First Nation, November 12, 1997, pp. 59-60

Although Scott did write a memorandum authorizing Murison to have Indians in the Lesser Slave Lake Agency sign surrender documents individually or in small groups, Canada argues that there is no evidence to suggest that Murison acted on these instructions in relation to the Duncan's Band. In fact, since Murison made no effort to hide the fact that he took individual assents from members of the Beaver Band, Canada further submits that it can be implied that, in Duncan's case, no such steps were required and the individuals who attested to the surrender were in fact present at the meeting.[231]

With regard to the First Nation's challenges to the surrender documents, Canada first submits that no significance or negative inference should be attached to the fact that all five voting members signed the surrender document, but only three signed the affidavit. Subsection 51(3) of the *Indian Act* merely prescribed that "some of the chiefs or principal men present thereat and entitled to vote" were to certify the Band's assent.[232] As to the suggestion that the surrender documents were forged, Canada replies that the inconsistencies between a voter's marks on different documents, or the similarities between the marks of different voters on a single document, can be explained by the common practice of having the signatory touch the pen as his mark is being made by the Indian agent:

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[226] Written Submission on Behalf of the Government of Canada, November 17, 1997, p. 18.

[227] Written Submission on Behalf of the Government of Canada, November 17, 1997, p. 18; ICC Transcript, November 26, 1997, pp. 148-49 (Perry Robinson).

[228] Harold Laird, Indian Agent, to the Assistant Deputy and Secretary, DIA, October 29, 1929, NA, RG 10, vol. 7544, file 29131-5, pt 2 (ICC Exhibit 6, tab F); Written Submission on Behalf of the Government of Canada, November 17, 1997, p. 18; ICC Transcript, November 26, 1997, pp. 149-50 (Perry Robinson).

[229] Interview of Angela Testawits, December 5, 1973, p. 3 (ICC Exhibit 6, tab G); ICC Transcript, November 26, 1997, pp. 132 and 149 (Perry Robinson).

[230] ICC Transcript, November 26, 1997, pp. 150-51 (Perry Robinson).

[231] Written Submission on Behalf of the Government of Canada, November 17, 1997, p. 19; ICC Transcript, November 26, 1997, p. 137 (Perry Robinson).

[232] ICC Transcript, November 26, 1997, p. 134 (Perry Robinson).

> 100. For example, to account for the three marks on the surrender document being made by the hand of one person, reference is made to a circular from Deputy Superintendent General Pedley to Indian Agent Gooderham dated July 28, 1904 [which] states in part:
>
> > "The Department's attention has been drawn to the fact that in some instances when Agents make payments to Indians and issue receipts, which should be signed by mark (the Indian touching the pen), the mark is made when the Indian is not present. According to law, a valid receipt cannot be given by an illiterate person unless he touches the pen when "the mark" is being made. Agents are therefore warned that in future the mark of an Indian must be made by the Indian touching the pen, and the act must be witnessed by a third party, who must sign as witness. Before an Indian makes his mark to a receipt or other document the transactions should be fully explained to him...." (Ex. 6(j))
>
> 101. It is submitted that this is consistent with the common law concerning signatures in the case of wills which indicates that subscription by mark is sufficient when a pen has been guided by another person or where the signature or mark has been written by another while the signatory holds the tip of the pen.
>
> 102. In the case of a surrender, the validity is not dependent upon whether a particular individual made their own mark. Rather, the key issue is, whether the person "signing" was in fact present, was aware of the nature and content of the document and intended to sign.[233]

Second, regarding the First Nation's argument that the surrender documents could not be used to demonstrate the truth of their own contents since they had been prepared previously and appeared unaltered, Canada contends that the evidence does not bear this out. Both Murison's report of October 3, 1928, and Angela Testawits's interview illustrate, in Canada's view, that a meeting was held and that the Indians in fact negotiated the terms of the surrender.[234]

Third, to counter the First Nation's position that the surrender documents may have been inadequately executed, Canada emphasizes that notary W.P. Dundas – "the only independent person in relation to this whole surrender"

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[233] Written Submission on Behalf of the Government of Canada, November 17, 1997, p. 35. Footnote references omitted.

[234] ICC Transcript, November 26, 1997, p. 190 (Perry Robinson).

– attested to the fact that three members of the Band stood before him in Waterhole and swore to the truth of their affidavit. Counsel submits that Dundas's independence, and the risks he would have faced for knowingly attesting to a false affidavit, mean that he should be given the benefit of the doubt when assessing the integrity of that affidavit.[235]

Finally, Canada notes that, in making its case, the First Nation has relied primarily on the evidence of elder John Testawits, who was not present when the surrender was taken and did not return to the reserve until 1931. In counsel's submission, where this evidence conflicts with that of Angela Testawits, Angela should be given "pre-emptive credibility as she is the only voice we have from a firsthand, on-the-scene participant at the surrender meeting."[236] The First Nation disputes this point, arguing that Angela's remarks were made without legal advice or preparation in the context of the claim. Counsel suggested that Angela's evidence regarding the sale by her "old man" related not to the surrenders but to the subsequent dispositions of the surrendered lands by public auction.[237] He also questioned the weight that should be given to

> a portion, probably less than five minutes worth, of a 32-minute interview with Angela Testawits in 1973 when she was 80 years old and that occurred some 45 years after the events described. This testimony is unsworn, unexamined and unexplained. In [a] civil situation this would be hearsay with a capital H.[238]

Counsel further argued that Canada had an opportunity to cross-examine John Testawits on his various statements and statutory declarations, and, having failed to do so, should not be able to imply that he lied about what he had been told by Joseph, Samuel, Angelique, and even Angela Testawits. Because John Testawits's evidence was given in the context of the Commission's inquiry, it should be preferred to the information obtained from Angela Testawits.[239]

The Commission has set out in some detail the parties' arguments with respect to whether a meeting took place because this issue forms a central theme of the First Nation's claim. However, we have little doubt that the meeting did, in fact, occur. In particular, we are struck by the remarkable consistency between the accounts of Murison and Angela Testawits regarding the discussions involving the three additional terms inserted by Murison and the price to be paid for the surrendered lands. It will be recalled that Murison wrote in 1928:

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[235] ICC Transcript, November 26, 1997, pp. 133-35 (Perry Robinson).
[236] ICC Transcript, November 26, 1997, pp. 130-31 (Perry Robinson).
[237] ICC Transcript, November 26, 1997, pp. 206-07 (Jerome Slavik).
[238] ICC Transcript, November 26, 1997, p. 205 (Jerome Slavik).
[239] ICC Transcript, November 26, 1997, p. 209 (Jerome Slavik).

> They asked what they would get for the land, but this I was not able to inform them, but told them that it would be sold by public auction to the highest bidder which seemed to satisfy them. The second condition is that all monies received from the sale of the said lands would be placed to their credit and interest thereon paid to them annually on a per capita basis. Also that an initial payment of $50.00 be made to each member of their band on or before the 15th day of December, 1928. They also asked if a portion of the proceeds could be used in the purchase of stock, farm implements and building materials and I inserted a condition in the surrender covering this request.[240]

In her interview, Angela stated in 1973:

> The officials told him [Joseph Testawits] there isn't a figure that we can count with in terms of money entitled to each individual with the amount of land you have sold, now what do you want to do? He replied, "as long as there is one of my people left, every fall and spring money should be given to them." His other request was that if someone wanted to farm, he should be provided with a tractor and implements, that was what he wanted, we never saw any of these things. We received $200 in the fall and the same in the spring but since my husband died we didn't even get $50.[241]

In the Commission's view, this brief excerpt from Angela's interview deals with each of the items described in the preceding quotation from Murison's report: price, the initial payment, annual interest payments, and farm implements. As to the First Nation's objection that Angela's statements constituted hearsay, we can only observe that there must surely be less objection to the evidence of someone like Angela, who was actually there at the surrender meeting, than to that of John, who merely relayed the recollections of others. In any event, we are more interested in Angela's recollection of what was said and what she observed than in any use of those recollections to establish the truth of the statements made by Murison and Joseph Testawits, and for this reason we do not believe that Angela's evidence falls afoul of the hearsay rule.

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[240] W. Murison, Inspector of Indian Agencies, to W.M. Graham, Indian Commissioner, October 3, 1928, NA, RG 10, vol. 7544, file 29131-5, pt 1 (ICC Documents, pp. 253-54).

[241] Interview of Angela Testawits, December 5, 1973, p. 3 (ICC Exhibit 6, tab G).

While it is true that Angela Testawits gave evidence at the age of 80,[242] some 45 years after the surrender, John Testawits's evidence, given at a similar age, was not only second-hand but was given closer to 65 years after the surrender. It also displayed a number of troubling inconsistencies. In his statutory declaration of December 3, 1991, John asserted that Samuel, Angelique, and Angela Testawits attended the meeting with L'Heureux,[243] but in his evidence before the Commission at the community session in Brownvale on September 6, 1995, he stated that "[i]t was just those two old ladies at Berwyn at the time of the signing of the surrender at Berwyn" and that Samuel was away putting up hay.[244] Similarly, during the course of a transcribed interview with trader Ben Basnett on February 25, 1992, John indicated that Joseph Testawits was absent during the surrender meeting because he was away haying at Spirit River and Bear Lake, suggesting a meeting in late summer or early fall.[245] This evidence is consistent with John's statutory declaration,[246] but it is contrary to his interview before Commission counsel on August 15, 1995, where he stated:

> I never signed nothing he [Joseph Testawits] told me straight out. If somebody did he said it's all hogwash because I never signed nothing. How could I sign anything when I was away. I was at Spirit River hunting all through, beaver hunt and that would take right up to May and after that it was June and he was still not back from the beaver hunt. And that's as far as I know.[247]

It also contradicts his evidence at the community session, which again suggests that the surrender meeting would have taken place in late spring or early summer.[248] However, in our view, nothing turns on these inconsistencies. It seems that John Testawits may have been recounting the recollections of his predecessors with regard to a different meeting in a different location (Berwyn), involving different elders from those who participated in the surrender meeting on IR 152.

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[242] It should be noted that, although in her interview Angela Testawits stated that "[r]ecently, I had my age marked as 80 years old." interviewer Richard Lightning recorded her age as 91 years: Interview of Angela Testawits, December 5, 1973, p. 1 (ICC Exhibit 6, tab G).

[243] Statutory Declaration of John Testawits, December 3, 1991, p. 5 (ICC Exhibit 10, tab A, Schedule 4; ICC Exhibit 10, tab B, Schedule 7).

[244] ICC Transcript, September 6, 1995 (ICC Exhibit 6, tab C, p. 36) (John Testawits).

[245] Interview of Ben Basnett, February 25, 1992, p. 30 (ICC Exhibit 6, tab A).

[246] Statutory Declaration of John Testawits, December 3, 1991, p. 5 (ICC Exhibit 10, tab A, Schedule 4; ICC Exhibit 10, tab B, Schedule 7).

[247] Indian Claims Commission, "Interview of Elders John Testawits and Ted Knott Taken at the Mile Zero Hotel, Grimshaw, Alberta," August 15, 1995, p. 8 (ICC Exhibit 6, tab B).

[248] ICC Transcript, September 6, 1995 (ICC Exhibit 6, tab C, p. 41) (John Testawits).

The Commission does not wish to be taken as being critical in any way of John Testawits or as suggesting that he and the other elders on whose information he relied were not telling the truth. Recalling events that occurred as much as 65 years ago is a difficult undertaking at the best of times, and doubly so for someone who did not have the advantage of experiencing those events personally.

Nevertheless, we conclude that the alleged meeting of September 19, 1928, actually took place. As Canada has submitted, there is no evidence to suggest that Murison met with band members individually or in small groups, as allegedly occurred in relation to the surrender by the Beaver Band. Murison was frank in describing his difficulties in gathering voters for the Beaver and Swan River Band surrenders, but, as counsel for the First Nation admits, there is no report of any similar efforts being required in relation to the Duncan's Band.[249]

Likewise, we do not find it surprising that Murison met members of the Duncan's Band on Beaver IR 152 since, as we will discuss below, John and James Boucher – and indeed other members of the Band – may have resided on or near that reserve at the time of the surrender. In fact, in September 1928, it may well have been more convenient for many Band members to meet with Murison on the Beaver reserve than on their own. As Laird reported with regard to paying treaty annuities to the Band just over a month earlier:

> The next morning [August 3, 1928] I drove to Reserve No. 152, where the Beaver Indians were paid, – 46 Indians – $250.00. There were 4 deaths on this Reserve since the 1927 payments.
>
> *On the above Reserve, most of the Indians of Duncan Tustawits' Band were encamped*, who were paid after the Beaver Indians. Leaving Mr. Scovil to pay *the few remaining Indians of this Band on the Reserve near Berwyn* [presumably IR 151], I drove to Peace River (Crossing) and took train for Enilda, reaching Grouard by stage at 7 in the morning of the 4th.[250]

We conclude that Canada's representatives likely met with band members on IR 152, where most of them may have already congregated, and that three of the voters – Eban Testawits, James Boucher, and Joseph Testawits – subsequently accompanied Murison and Laird, or made their own way, to

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[249] Written Submission on Behalf of the Duncan's First Nation, November 12, 1997, p. 22; ICC Transcript, November 25, 1997, p. 50 (Jerome Slavik).

[250] Harold Laird, Indian Agent, to Assistant Deputy and Secretary, December 4, 1928, NA, RG 10, vol. 6920, file 777/28-3, pt 3, C-8012 or C-10980 (ICC Exhibit 15, vol. 3).

Waterhole to swear the affidavit before Dundas. This is not to say that the alleged meeting involving Samuel, Angelique, and Angela Testawits did *not* occur, but, even if it did, that does not mean that we would have to conclude that the surrender meeting did not happen.

We are mindful of the First Nation's concerns with regard to the surrender documents. However, the evidence before the Commission does not lead us to conclude that the surrender documents were fabricated, as counsel for the First Nation urges us to believe. We also disagree that the existence of different signatories to the surrender document and the affidavit should lead to the implication that a meeting did not occur. As for the shortcomings, if any, in Dundas's jurat, we consider those to be the sort of technical deficiency in certifying the surrender *after the fact* that McLachlin J found insufficient to render invalid the surrender in *Apsassin*.

Although the First Nation argues that the surrender documents were prepared in advance of the meeting, there is, in our view, considerable evidence to suggest that they may have been redrafted on site. Murison's report of October 3, 1928, and Angela Testawits's evidence both indicate that the additional terms were discussed. Perhaps more telling, however, are the documents themselves. The date on the surrender document – "this nineteenth day of *September* in the year of our Lord one thousand nine hundred and twenty-eight" – is, like the rest of the document (with the exception of the handwritten word "September"), *typewritten* without any obvious amendment. We are at a loss to explain why the word "September" was handwritten. Although we might speculate as to the reason, we would nevertheless be surprised, assuming this document was prepared in advance, if the draftsman would have known the exact day of the month – the nineteenth – on which the document would be executed. Similarly, on the affidavit, the names of Murison and the principal men, the location in which the affidavit was sworn, and the date on which the affidavit was sworn were all completed by typewriter. We fail to see how this document could have been prepared in advance, since the names of the deponents and the date of the meeting to swear the affidavit would likely have remained uncertain until the actual event. Even counsel for the First Nation seemed prepared to concede at the community session that Murison "obviously had a typewriter with him, because he typed up an alternative form [of surrender for IR 151H] on the 20th [of September, 1928]...."[251] Moreover, we note that, when he sent the new forms to Indian Commissioner Graham on August 9, 1928, Acting Deputy Superintendent General J.D. McLean wrote that "[a]dditional copies of surrender forms are herewith, in order that the change in the name of the Band *may be made*";[252] this language appears to anticipate that the new documents were yet to be prepared. In conclusion, it seems apparent that, even if documents *were* prepared in advance, new ones were drawn up to incorporate the additional terms and the particulars of execution.

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[251] ICC Transcript, September 6, 1995 (ICC Exhibit 6, tab C, pp. 100-01) (Jerome Slavik).

Nevertheless, having concluded that a meeting did take place, we must still consider whether the other criteria in section 51 of the 1927 *Indian Act* were satisfied.

Was the Meeting Summoned to Deal with the Surrender?

In dealing with this criterion, Estey J in *Cardinal* stated: "Firstly, the meeting must be called to consider the question of surrender explicitly. It may not be attended to at a regular meeting or one in respect of which express notice has not been given to the band."[253] It will be seen that there are two aspects to this criterion: the purpose of the meeting, and notice.

As to whether the meeting was summoned for the purpose of dealing with the surrender, this point was not really argued before us. Canada takes it as given that the meeting was called to consider the surrender, while the First Nation, as we have discussed, denies that a meeting was called or took place at all.[254]

On this point, it will be recalled that A.F. MacKenzie, the Acting Assistant Deputy and Secretary for Indian Affairs, asked Laird on April 4, 1928, "[W]hat would be the most suitable time to call a meeting of these Indians for the purpose of considering this matter [the surrender]?"[255] Laird responded that August 6, 1928, "the date advertized for the payment of Annuities to the Indians interested in the small Reserves mentioned, would be a suitable date for a meeting of the Band."[256] Ultimately, annuities were distributed on August 3, 1928, at which time, according to Murison's October 3, 1928 report, Band members were notified that there would be a meeting later that year to consider "the question of surrender." It is unclear whether the failure to deal with the surrender in early August resulted from concerns that the meeting to pay annuities might then be considered to have been called for a purpose other than surrender, contrary to subsection 51(1); alternatively, that failure may have stemmed from the delays in providing the replacement surrender documents, which were not sent to Murison until August 9.[257] In any event, there seems to be little doubt, from the Commission's perspective, that the September 19, 1928, meeting was summoned for the precise purpose of dealing with the surrender, particularly since there is no evidence to suggest that any other business took place there.

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[252] J.D. McLean, Acting Deputy Superintendent General, to W.M. Graham, Indian Commissioner, August 9, 1928 (ICC Documents, p. 218).

[253] *Cardinal v. R.*, [1982] 1 SCR 508, 13 DLR (4th) 321, [1982] 3 CNLR 3 at 10.

[254] Written Submission on Behalf of the Duncan's First Nation, November 12, 1997, p. 45.

[255] A.F. MacKenzie, Acting Assistant Deputy and Secretary, DIA, to Harold Laird, Indian Agent, April 4, 1928, DIAND file 777/30-8, vol. 1 (ICC Documents, p. 200).

[256] Harold Laird, Indian Agent, to Assistant Deputy and Secretary, DIA, April 10, 1928, DIAND file 777/30-8, vol. 1 (ICC Documents, p. 201).

Turning to the question of notice, the First Nation submits that the Crown failed to give notice of a surrender meeting[258] or, at the very least, that the notice was insufficient and certainly not what Estey J referred to as "express notice."[259] Although prepared to acknowledge that four male members of the Band were advised on August 3, 1928, upon receiving treaty annuities at Dunvegan, "that an official would meet them some time later this year to take up the question of surrender with them," counsel for the First Nation argues that this advice failed to stipulate a date, time, or location of the meeting or any indication of whether the purpose of the meeting was to take the surrender or simply to discuss possible terms.[260] Counsel also refers to Scott's instructions to his agents, which stipulated, in the absence of a band's own rules on the subject of notice, the conspicuous posting of printed or written notices on the reserve at least one week before the surrender meeting, followed by the interpreter delivering, where practicable, written or verbal notice to each Indian on the voters' list not less than three days before the meeting; in the event that an agent was unable to comply with these instructions, he was instructed to provide sufficient reasons detailing his failure to do so. In counsel's submission, although Murison would have known of Scott's instructions, there is no record of notices being posted on the reserve,[261] no record of written or verbal notice being given to eligible voters, and no record of any reason for failing to provide such notice.[262]

Moreover, counsel contends that, of the four individuals to whom notice was given during the payment of treaty annuities at Dunvegan on August 3, 1928, John and James Boucher were long-time residents of the Beaver reserve, Emile Leg resided near Eureka River, and Francis Leg was of no fixed address. Therefore, since Murison gave no report of any efforts to gather band members, as he did with the Beaver and Swan River Bands, counsel concludes that those band members resident on IR 151 must have received no notice of the meeting.[263] Accordingly, "it strains credulity," in counsel's submission, "to accept that the majority of the eligible voters of Duncan's were allegedly assembled late in the afternoon of September 19, 1928 on the Beaver Indian Reserve with virtually no notification or effort on the part of Murison."[264]

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[257] J.D. McLean, Acting DSGIA, to W.M. Graham, Indian Commissioner, August 9, 1928 (ICC Documents, p. 219).
[258] Written Submission on Behalf of the Duncan's First Nation, November 12, 1997, p. 68.
[259] ICC Transcript, November 26, 1997, p. 215 (Jerome Slavik).
[260] ICC Transcript, November 25, 1997, p. 91 (Jerome Slavik).
[261] ICC Transcript, November 25, 1997, pp. 82-83 (Jerome Slavik).
[262] Written Submission on Behalf of the Duncan's First Nation, November 17, 1997, pp. 45-46.

Besides its objection that Scott's instructions to his Indian agents did not superimpose a secondary order of mandatory surrender requirements over and above the provisions of the *Indian Act*, Canada takes the position that those instructions were simply not practical in Duncan's case. Counsel asserts that, if there is no place on a reserve to conspicuously post a notice, since the band is not resident there, it would be absurd to suggest that posting a notice should be a mandatory requirement when it would obviously not suffice to notify people of the impending meeting. It then becomes necessary, in counsel's view, to resort to other means of giving notice.[265]

Whatever those other means might have been, Canada contends that prior notice of the meeting was in fact given, and that the surrender affidavit is at least *prima facie* evidence that the Crown's representatives complied with the statute.[266] Moreover, in a letter dated January 31, 1997, from Michel Roy, the Director General of the Specific Claims Branch, to Chief Donald Testawich and counsel for the First Nation, Canada stated:

> The evidence indicates that the matter of a surrender was not raised unexpectedly as it had been discussed with DFN [Duncan's First Nation] members on at least two earlier occasions, including: at treaty time on July 10, 1925; and at a July 14, 1927 meeting between Agent Laird and DFN members at which time the parties discussed the possibility of surrendering reserves 151 and 151B to 151G. The evidence indicates that notice was given on August 3, 1928 to the effect that an official would meet with the DFN some time in the year to take up the question of a surrender.... In Canada's

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[263] ICC Transcript, November 25, 1997, p. 52 (Jerome Slavik).

[264] Written Submission on Behalf of the Duncan's First Nation, November 12, 1997, p. 22.

[265] ICC Transcript, November 26, 1997, p. 154 (Perry Robinson).

[266] Written Submission on Behalf of the Government of Canada, November 17, 1997, pp. 17-18; ICC Transcript, November 26, 1997, p. 156 (Perry Robinson).

> view, the fact that a majority of eligible voters attended the surrender meeting is also indicative of sufficient notice.[267]

Counsel further points to Murison's report that "[t]hese Indians were prepared for me and had evidently discussed the matter very fully amongst themselves" as evidence that sufficient notice of the meeting to consider surrender had been duly given to Band members.[268]

The Commission is inclined to agree with Canada on this point. For reasons we have previously given, we have less difficulty than the First Nation in accepting that band members were able to assemble on Beaver IR 152 on September 19, 1928, since it appears that they may have already been there, having recently received their treaty annuities on that reserve. However, given the First Nation's doubts regarding the whereabouts of band members in 1928, the Commission has undertaken a careful review of the treaty annuity paylist for that year.

Of the 50 band members paid in 1928, it appears that 19 – including the Bouchers and the Legs – were paid on the Beaver Band's IR 152A near Dunvegan, two were paid at Grouard, one at Sucker Creek, one at Whitefish Lake, one at Swan Lake, and two others at specified but illegible locations. With respect to the remaining 25, including the three Testawits brothers, there is nothing on the paylist to indicate where they received their annuities. However, Laird reported on December 4, 1928, that "most" of the Indians of the Duncan's Band were "encamped" and paid on IR 152 on August 3, with Laird's assistant paying "the few remaining Indians of this Band on the Reserve near Berwyn" on August 6, 1928.[269] The reference to "most" of the Indians being paid at IR 152 appears incongruous if Laird meant only those 19 band members who were paid on IR 152A at Dunvegan. Obviously, 19 individuals would not represent "most" of the 50-member Band. Perhaps other members were paid on IR 152 at Fairview, and at the same time received notice of the fall surrender meeting, but the evidence on this point is inconclusive. More significant is the fact that Laird came across most of the members of the Band at IR 152 in August ***without having summoned them***

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[267] Michel Roy, Director General, Specific Claims Branch, Indian and Northern Affairs Canada, to Donald Testawich, Chief, Duncan's First Nation, and Jerome Slavik, Ackroyd, Piasta, Roth & Day, January 31, 1997 (ICC Exhibit 11, p. 4).

[268] Written Submission on Behalf of the Government of Canada, November 17, 1997, pp. 17-18; ICC Transcript, November 26, 1997, pp. 154-55 (Perry Robinson).

[269] Harold Laird, Indian Agent, to Assistant Deputy and Secretary, December 4, 1928, NA, RG 10, vol. 6920, file 777/28-3, pt 3, C-8012 or C-10980. Interestingly, there is nothing on the paylist to suggest that anyone was paid near Berwyn.

to be there; this illustrates that it should not have been surprising for them to be there in September and for the surrender meeting to have been held there, since that was where they frequently congregated and received their annuities in any event.

It is significant, in our view, that, even if only four potential voters were given notice at Dunvegan on August 3, 1928, two of the remaining potential voters in fact attended the meeting and were, in Murison's words, prepared to discuss the surrender. Further evidence of this preparedness is demonstrated in the Band's negotiation and settlement of the terms of the surrender, as illustrated in Murison's report and Angela Testawits's comments concerning the additional conditions inserted in the documents at the Band's request. We have also had regard for Canada's argument that the issue of surrender was raised with the Band at meetings on July 10, 1925, and July 14, 1927, the implication of which is that the subject was not new to band members when the surrender meeting took place on September 19, 1928. Similarly, on March 10, 1928, Laird anticipated receiving inquiries from band members returning from the hunt "as to whether any action has been taken re[garding] the suggested surrender of their small reserves."[270] In this sense, the evidence is reminiscent of the findings of Addy J at trial in *Apsassin*, as relied upon by McLachlin J in the Supreme Court of Canada:

> 1. That the plaintiffs had known for some considerable time that an absolute surrender of I.R. 172 was being contemplated;
> 2. That they had discussed the matter previously on [sic] at least three formal meetings where representatives of the Department were present;
> 3. That, contrary to what has been claimed by the plaintiffs, it would be nothing short of ludicrous to conclude that the Indians would not also have discussed it between themselves on many occasions in an informal manner, in their various family and hunting groups.[271]

We acknowledge that the record is lacking in details regarding the date, time, and place of the surrender meeting, but we must concur with Canada that posting a notice on the reserve in this case would have been an exercise in futility. The real key is not the *means* of notice but the *sufficiency* of that notice. We conclude that there was apparently sufficient notice, since most of the eligible voting members attended and were reportedly prepared to proceed.

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[270] Harold Laird, Indian Agent, to Assistant Deputy and Secretary, DIA, March 10, 1928, DIAND file 777/30-8, vol 1 (ICC Documents, p. 196).

[271] *Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)*, [1995] 4 SCR 344 at 372, [1996] 2 CNLR 25, 130 DLR (4th) 193, McLachlin J.

Was the Meeting Summoned According to the Rules of the Band?

Even if the members of the Duncan's Band received adequate notice of the surrender meeting, the First Nation contends that the Crown's representatives failed to summon or conduct the meeting in accordance with the Band's practices.[272] In the First Nation's submission, the Band should have controlled where and when the meeting was to be held, what the subject matter of the meeting would be, how notice of the meeting would be given, and who would be entitled to attend. As counsel stated:

> When you call a meeting, you think of all those things. It's a fundamental issue of being able to control the process. Control. That's what summoning according to the rules of the Band means. The Indians control the process. In this case there is no evidence that anyone in the Band summoned a Band meeting together on the Beaver Indian Reserve. They didn't control the process. They didn't control all those crucial factors that so much affect the outcome, timing and substance of a decision.
>
> Who did control that? The Department. Is there any explanation of the Department what they thought the rules of the Band were throughout this by anyone? No.[273]

Relying on the evidence of John Testawits, counsel submitted that the Band's normal practice for summoning a meeting was that "they would call a meeting at someone's home on the reserve, and they would have the whole community come and discuss an important event, and that the meeting would be held on the reserve in the community, not somewhere else."[274] Since the September 19, 1928, meeting was held 30 miles from the reserve, without notice or recorded efforts of trying to gather people to attend, and since the Band did not control the process, the meeting was not called according to the rules of the Band. In the First Nation's submission, this represented a substantive breach of the *Indian Act* surrender requirements and thus invalidated the surrender.[275]

Canada responds to these submissions in two ways. First, it argues that John Testawits was away at school when the surrender was taken and therefore is not in a position to speak about the Band's rules for calling meetings at that time. Second, it contends that there is no evidence before the Commission that the Band had *any* rules for calling meetings at that time in any event.[276] According to counsel, John Testawits's evidence, to the extent that it can be given weight, illustrates a lack of "any authoritative procedures on calling meetings" and "suggests the existence of an informal and flexible practice,"[277] much like that found by Killeen J in *Chippewas of Kettle and Stony Point* and by Addy J (without contradiction by the Federal Court of Appeal or the Supreme Court of Canada) in *Apsassin*. The First Nation having failed to establish governing rules of practice, counsel submits that the *Indian Act*'s requirement for calling meetings in accordance with band rules simply does not apply in these circumstances:

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[272] Written Submission on Behalf of the Duncan's First Nation, November 12, 1997, p. 68.
[273] ICC Transcript, November 26, 1997, p. 213 (Jerome Slavik).
[274] ICC Transcript, November 25, 1997, p. 94 (Jerome Slavik).
[275] ICC Transcript, November 25, 1997, pp. 94-95 (Jerome Slavik).

> ... the requirement to summon the meeting according to the rules of the Band essentially only applies if the Band actually had rules for calling meetings. Otherwise notice is going to have to be given to the Band members, and if there is no established Band practice, I would submit that whatever is going to work for the Band to get them at this meeting is going to be the course of conduct that is going to be undertaken.[278]

In *Chippewas of Kettle and Stony Point*, the plaintiff Band similarly alleged that a surrender meeting had not been called in accordance with the rules of the Band. Those rules, in the Band's submission, required a Band Council Resolution to authorize a General Council meeting to consider a surrender proposal. Since the surrender meeting in that case had not been authorized by a Band Council Resolution, the Band submitted that the requirements of subsection 49(1) of the 1906 *Indian Act* had not been met. However, Killeen J rejected this argument, concluding that, although there was evidence in that case of previous General Council meetings being summoned by Band Council Resolution, "there is no convincing evidence that the Band had a written or customary rule, of an inflexible nature, requiring that such a Band Council Resolution precede the General Council meeting."[279]

Similarly, in *Apsassin*, the plaintiff Band argued that the surrender was invalid because the surrender meeting had not been called in accordance with the rules of the Band. Addy J held that the Band bore the onus of establishing that it had rules for summoning meetings or council, but that this evidentiary burden had not been met on the facts in that case.[280]

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[276] Written Submission on Behalf of the Government of Canada, November 17, 1997, pp. 16-17.

[277] Written Submission on Behalf of the Government of Canada, November 17, 1997, p. 17.

[278] ICC Transcript, November 26, 1997, p. 151 (Perry Robinson).

[279] *Chippewas of Kettle and Stony Point v. Canada (Attorney General)*, [1996] 1 CNLR 54 (Ont. Ct (Gen. Div.)) at 84.

[280] *Apsassin v. The Queen*, [1988] 1 CNLR 73 (FCTD) at 88.

In light of these authorities, the Commission has carefully reviewed John Testawits's evidence regarding the Band's practice for calling meetings in 1928, and we believe that certain portions of it warrant highlighting. On examination by counsel for the First Nation, Testawits stated:

> Q ... If the Indian Agent wanted to get some information from you or to make a decision, he wouldn't call a council meeting. How would he do it? Would he just talk to you or talk to someone else? Would he talk to Joseph? How would he do it?
>
> A You mean before I got –
>
> Q Yes, before –
>
> A Well, the Indian Agent would come, and he talked to the people, and get to talk – we gather as a meeting, just like this, just to get together on it, and then we talk about it ahead of time, what's our intentions, what should be done and this and that, and we consult with the elders, of course, Joe, and that is the way we accomplished things. We didn't need no band council resolution. There wasn't no band council at that time, no chief yet. So whatever consensus the people said – the grassroots people is the ones we consulted with, and whatever they figured best, well, that's the way we done it until such time as I got in as chief, and then we got a band council resolution from there on.
>
> Q To make an important decision, then, the people would have a meeting amongst themselves to talk about it?
>
> A Yeah, we had a meeting amongst ourselves, yeah.
>
> Q So would that include the men and the women?
>
> A We bring in everybody before I was chief. We bring in everybody. We had a meeting in somebody's house. Sometimes Uncle Joe's house, and sometimes Angelique's, Mr. Jack Knott's place.
>
> Q That is the way they had been doing it for years. They would meet at somebody's house on the reserve and talk it over?
>
> A Yeah.
>
> Q Do you think that is the way they would do it while you were away at school in the twenties? They would do it the same way?
>
> A Oh, yes, they would do the same process. They would talk about it. ***Whichever way the best thing that could be done, that is the way they done it.*** But I wasn't around, so they just done it their way, and that's it.
>
> Q But if they had to make an important decision, though, they would meet. There would be a meeting at somebody's house to talk about it.
>
> A M-hm.
>
> Q They wouldn't make an important decision – one person wouldn't make an important decision on their own.
>
> A They all have to get in together on it, not just one person. Because they used judgment of people, the grassroots people. They are not wrong. They bring in everything, whatever they figure they could do best, it should be done, and that is

the way they do it. Just as simple as that. Now it takes a band council resolution to get it going.

Q	But in those days, all the adults would gather at somebody's house and talk it over?
A	Yeah. You didn't need to be at somebody's house. You could go in a tepee, some tepees and some tents, go there and sit around and talk about it, and that is it. When you are done, you are done. Just as simple as that.
Q	If they had an important decision to make in the community, would they go, for example, and hold a meeting at Fairview? In, say, the twenties and thirties, would they go all the way to Fairview to hold a meeting?
A	***No, not necessarily....***
Q	When the Indian Agent wanted a decision from the members, he would come to the reserve.
A	The people come to him. He comes with his buggy. Most of the time, they are driving the buggy, little buggy. They come. When he come there, everybody knows about it, because they know they going to get that treaty money or they are going to get rations. That is relief, we call it.
Q	But Johnny, the point I am trying to get to you is that, in your view, if there was an important decision to be made, you would not go to – you wouldn't have all the adults and women and everybody go to Fairview for a meeting with the Indian Agent. The Indian Agent would come to the reserve.
A	Yeah, that's what I said.[281]

From this excerpt, we conclude that meetings of the Duncan's Band were convened on a relatively *ad hoc* basis, without much concern for niceties of form. The Band simply adopted whatever course it thought best to deal with the problem at hand. The Band's meetings may have been, but were not necessarily, held in someone's house or even on the reserve. As for the Band's control of the meeting process, there is virtually no evidence of how the 1928 surrender meeting was conducted, although we have already found it more likely that Murison came to the Indians on IR 152 than that they came to him.

The Duncan's Band, like many bands in the Treaty 8 area, appears to have been a band more in name than in substance, constituting as it did a collection of families assembled for the purposes of hunting and trapping. Its people were not a cohesive group but rather seem to have congregated from time to time only as circumstances might require, such as for the annual

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281 ICC Transcript, September 6, 1995 (ICC Exhibit 6, tab C, pp. 62-65) (John Testawits). Emphasis added.

payment of treaty annuities.[282] Therefore, it is not surprising that the Band should have little or nothing in the way of formal rules or procedures for calling and conducting meetings, and that, when Band members *did* get together to deal with issues that might arise, they would do so on an informal basis.

Based on this scant evidence, we conclude, as Addy J did in *Apsassin*, that the First Nation has failed to establish that it had any fixed rules in 1928 for summoning meetings or councils. Accordingly, we cannot infer that the meeting was called in contravention of band rules or practice, nor can we hold that Canada was in breach of this provision of subsection 51(1).

Who Were the Male Members of the Band of the Full Age of 21 Years?

Having concluded that there was a surrender meeting, summoned with sufficient notice and without contravening any rules of the Band, for the specific purpose of dealing with the surrender, and held in the presence of duly authorized officers of the Crown, we turn now to the eligibility requirements of section 51.

The first criterion for determining whether an individual was entitled to attend and vote at a surrender meeting in 1928 is set forth in subsection 51(1) of the 1927 *Indian Act*. That subsection stipulates that a surrender "shall be assented to by a majority of the male members of the band of the full age of twenty-one years." Therefore, to be eligible to vote, an individual was required to be male, a member of the Band, and at least 21 years old.

Generally, in considering these criteria, the First Nation submits that the Commission should assess the Band's paylists and surrender voters' list with a critical eye. Laird was described by his successor as "manipulative and careless" in handling paylists, and was later found to have misappropriated funds by failing to deliver annuity payments or by pocketing payments for deceased individuals whom he reported as still alive. Moreover, he characteristically underreported adult band members. For these reasons, the First Nation argues that Laird's integrity and competence should be questioned, and that his paylists should be considered "inherently unreliable."[283]

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[282] As Neil Reddekopp commented:

> From the standpoint of social organization and the occupation and use of land, the distinction between the Beaver and the Cree is inconsequential. As with the Cree, the basic social and economic unit for the Beaver was the family, either nuclear or extended, and the largest permanent entity was the hunting band, made up of two or more families related by kinship ties. These hunting bands functioned independently of each other from the autumn of one year to the spring of the next. Each summer, a number of hunting bands would come together to form a regional band at a spot which favoured fishing, haying and hunting non-forest animals such as bison. One area which met all of these criteria and was admirably suited for spending the summer was found along the north bank of the Peace River between Dunvegan and the confluence of the Peace and Smoky Rivers.

G.N. Reddekopp, "The Creation and Surrender of the Beaver and Duncan's Band's Reserves," pp. 4-5 (ICC Exhibit 5).

As for Murison, counsel contends that there is no evidence to indicate that he made inquiries into whether there might be other eligible voters, such as Alex Mooswah, or whether the individuals on his voters' list actually qualified as being habitually resident on or near, and interested in the reserve. Since Murison allegedly included two deceased members of the Beaver Band as eligible voters in that Band's surrender documentation, and showed one of those two as an actual signatory to the surrender, it should be open to the Commission, in the First Nation's view, to infer that proper assent to the Duncan's surrender was not obtained:

> So on paper it looked good. I mean Murison knew how to paper over the event, that's my point. But the analysis of his voters list there, and how the vote was taken and the conduct of Murison didn't comply with what he said occurred in his Affidavit.
>
> The conclusion is that Murison was either negligent, careless, manipulative and in any event self-serving and negligent in his pursuit of these surrenders. In our view, he showed callous disregard for both the requirements of the Act and of the truthfulness of his statements.[284]

For its part, Canada stands by Murison's surrender voters' list, noting that both Murison and the three band members on the surrender affidavit swore that the surrender was assented to by a majority of the seven male members of the Band aged at least 21 years and entitled to vote.[285]

The Commission has had occasion to review various band paylists and voters' lists over the years, and we know they have not always proven to be accurate reflections of band membership or other information indicated on the face of those lists. For example, in the present case, the November 7, 1928, paylist for the first advance payment of $50 from the surrender proceeds to the Duncan's Band records a total of *eight* men as band members, including Isadore Mooswah (now known as Ted "Chick" Knott), whose age was shown as 23 years. The subsequent paylists for the second payment of $50 and interest payments to 1932 also show Isadore Mooswah as being 23 or 24 years of age[286] and thus eligible, on at least a *prima facie* basis, to vote at the surrender meeting. However, at the Commission's community session on September 6, 1995, Ted Knott declared that he attended school in the 1930s, and he gave his age as 82 years.[287] This means that he would have been born in 1913 and only 15 years of age at the time of the surrender – and thus ineligible to vote. As a consequence, we agree with counsel for the First Nation that we must carefully consider the paylist and voters' list information and, wherever possible, determine whether there is other evidence to prove or disprove the contents of those lists.

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[283] Written Submission on Behalf of the Duncan's First Nation, November 12, 1997, p. 25, ICC Transcript, November 25, 1997, p. 58 (Jerome Slavik).

[284] Written Submission on Behalf of the Duncan's First Nation, November 12, 1997, p. 25; ICC Transcript, November 25, 1997, pp. 59-60 (Jerome Slavik).

[285] Written Submission on Behalf of the Government of Canada, November 17, 1997, pp. 20-21

It is in this context that we now turn to our review of the First Nation's challenges to Murison's interpretation and application of the eligibility requirements in subsection 51(1) with regard to Alex Mooswah and the Leg brothers. We will then consider certain evidence raised by John Testawits regarding John Boucher's eligibility under that subsection.

Alex Mooswah

The First Nation contends that Alex Mooswah was 27 years old at the time of the surrender, but, despite being old enough to be eligible to vote, was for some reason excluded from the voters' list.[288] In drawing this conclusion, counsel relies heavily on the following evidence of Neil Reddekopp, a lawyer/genealogist with the Province of Alberta's Department of Aboriginal Affairs:

> Most documents associated with the Lesser Slave Lake Agency suggest that Alex Mooswah was born in approximately 1910. Murison gave his age as 19 in January 1930, but, as with Isidore Mooswah, Murison did not meet Alex. It was not until 1936 that Alex Mooswah received his own ticket, and his age was given as 29 in 1939.
>
> On the other hand, there is convincing, if circumstantial, evidence that Alex Mooswah was approximately 27 years of age when the Duncan's surrender vote was held in 1928. Some of this is contextual relating to the interpretation of entries on the paylists regarding Alex Mooswah and his father, Modeste Mooswah. Paylist entries for the latter do not indicate the birth of a boy in 1910 or 1911, the years in which Alex would have to have been born in order for his age to match Murison's 1930 estimate or the age given on the 1939 paylist. The only male births to Modeste Mooswah's

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[286] Paylist of First Advance Payment of Indians re Surrender of Reserves Nos. 151, 151B, 151C, 151D, 151E, 151F and 151G, Duncan's Band, November 5 and 7, 1928 (ICC Exhibit 6, tab K); Paylist of Second Advance Payment, Surrender of Reserves Nos. 151, 151B, 151C, 151D, 151E, 151F and 151G, Duncan's Band, January 28, 1930 (ICC Exhibit 6, tab L); Paylist of First Interest Payment, Duncan's Band, September 20, 1930 (ICC Exhibit 6, tabs M and N); Paylist of Second Interest Payment, Duncan Tustawits' Band, January and February 1931 (ICC Exhibit 6, tab O); Paylist of Third Interest Payment, Duncan's Band, undated (ICC Exhibit 6, tab P).

[287] ICC Transcript, September 6, 1995 (ICC Exhibit 6, tab C, p. 26) (Ted Knott).

[288] Written Submission on Behalf of the Duncan's First Nation, November 12, 1997, p. 26.

> ticket were recorded in 1902 or 1916. Alex Mooswah's own ticket indicates that his wife was 47 years of age in 1942, which alone would suggest that Alex was more likely to be approximately 40 than about 25 at that time. Added to this, both Isidore Mooswah [Ted Knott](born in 1913), Alex Mooswah's cousin and John Testawits (born in 1915) remember Alex as being considerably older than themselves.
>
> Finally, parish records reveal that Alex Letendre, the son of Modeste Letendre and Marie Tranquille, was born on December 27, 1901, and his January 14, 1902 baptism was recorded in the parish register at Spirit River. Identification of this child as Alex Mooswah requires, of course, the conclusion that the Modeste Mooswah who was Number 15 of Duncan's Band and the Modeste Letendre who was the father of Alex Letendre were the same person. In this regard, it should be noted that the interchangeable use of the names Monswa (or Mooswah) and Letendre is common in parish records through northern Alberta. There is also considerable overlap between the birth of children to Modeste Letendre and Marie Tranquille and the appearance of children on the ticket of Modeste Mooswah. Not only does the birth of Alex Letendre in December 1901 correspond to the appearance of a boy on Modeste Mooswah's ticket in 1902, the births of Charlotte in April 1904, Marie Rose in May 1908, and Elise in June 1911 correspond to the appearance of girls on the ticket in 1904, 1908 and 1912.[289]

Canada responds to the First Nation's submission by citing the conflicting evidence in Reddekopp's report as evidence that the First Nation has failed to establish on a balance of probabilities that Alex Mooswah should have been an eligible voter.[290] Moreover, after reviewing Ted Knott's evidence at the community session that he last saw Alex Mooswah in the summer or fall of 1935, at which time, in Knott's opinion, Alex was about 20 years old, Canada argues that Alex could not have been 21 years old in 1928.[291]

Having considered the evidence, and subject to the questions of residency and interest in the reserve raised by the First Nation in relation to the Leg brothers and other members of the Band, we are prepared to conclude on a *prima facie* basis that Alex Mooswah should have been included on the voters' list, although, as Canada suggests, it remains to be determined whether this oversight has any practical or legal significance.

Emile and Francis Leg

With regard to Emile and Francis Leg, the First Nation's primary position is that, even if they were band members, they were ineligible to vote because they were not habitually resident on or near, or interested in the Band's reserves, as required by subsection 51(2) of the *Indian Act*. We will consider that argument later in this report. First, however, we should consider John Testawits's evidence, based on discussions with his mother, that the Leg brothers were not even members of the Band,[292] a contention which, if true, would also have disqualified them from voting. Canada takes the position that both Emile and Francis were band members.[293]

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[289] G.N. Reddekopp, "The Creation and Surrender of the Beaver and Duncan's Band's Reserves," pp. 107-09 (ICC Exhibit 5). Footnote references omitted.

[290] Written Submission on Behalf of the Government of Canada, November 17, 1997, p. 21.

[291] ICC Transcript, November 26, 1997, pp. 171-72 (Perry Robinson).

It is interesting that counsel for the First Nation has not vigorously pursued this line of argument. By tacitly conceding that the Legs may have been band members while at the same time arguing that they were ineligible to vote for reasons of lack of residency on and interest in the reserves, counsel seeks to argue that the Legs *should* be counted for purposes of establishing a quorum for a surrender meeting, but *should not* be counted for the purposes of determining whether a majority of the male members of the Band aged at least 21 years assented to the surrender.

We will return to the issues of quorum and majority assent, but for now we feel that we can safely conclude that Emile and Francis Leg were members of the Duncan's Band. Both joined the Band in 1905 with their mother when she married into the Band, and they were given their own tickets on the annuity paylist in 1914 and 1915, respectively.[294] Neither appears to have resided for any length of time or at all on any of the Band's reserves, but, as we will see, that was not necessarily unusual for members of this Band. While the Legs' hunting and trapping may have taken them far afield and appears to have led to only sporadic contact with their Band, both consistently received their annuities with other band members from 1905 until well after the 1928 surrender. We see little in the way of concrete evidence to suggest that the Leg brothers belonged to another band and, based on their consistent inclusion on the Duncan's Band's paylists over many years, we conclude that they were members of the Duncan's Band.

John Boucher

Although this issue did not form a major pillar of its submission, the First Nation tendered evidence and argument to the effect that the 1928 surrender documents were fabricated because, although John Boucher appears as a signatory, he may have already been dead by that date. In his statutory declaration of December 3, 1991, elder John Testawits stated that John Boucher was dead before Testawits returned home from school in 1931,[295] and in his August 15, 1995, interview by Commission counsel, Testawits added that Boucher "died before 1928 according to the records."[296] Counsel for the First Nation tied this evidence into his argument that Agent Laird's paylists should not be trusted, given the extent of the paylist fraud in which Laird was later shown to have been engaged:

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[292] ICC Transcript, September 6, 1995 (ICC Exhibit 6, tab C, pp. 43-44) (John Testawits); Statutory Declaration of John Testawits, December 3, 1991, p. 8 (ICC Exhibit 10, tab A, Schedule 4; ICC Exhibit 10, tab B, Schedule 7); Indian Claims Commission, "Interview of Elders John Testawits and Ted Knott Taken at the Mile Zero Hotel, Grimshaw, Alberta," August 15, 1995, pp. 2-3 and 6 (ICC Exhibit 6, tab B); Written Submission on Behalf of the Duncan's First Nation, November 12, 1997, p. 28.

[293] ICC Transcript, November 26, 1997, pp. 180-81 (Perry Robinson).

[294] Paylist Comparison Database (ICC Exhibit 15, vol. 1).

> Mr. Reddekopp estimated that Mr. Boucher was probably born in around 1860, which at the time of the alleged surrender would have made him 68. There is no report of death either before 1928 or in 1931, '32, when it is reported on the paylist. So he is reported deceased on the 1932 paylist. He is shown as being paid in 1931. However, the pattern on the ticket has some but not all of the similarities related to those cases of fraud by Indian Agent Laird. And you heard Mr. Testawits speak of the fraud whereby annuities were paid to people on the paylists that were deceased.
>
> This was discovered in 1930. Laird was fired in '30. And most of the names of the elders who were the objects of the fraud were deleted from the paylists in 1932, the same year as John Boucher was deleted from the paylist. He may be a possible candidate for fraud as he was an elderly man. He was quite isolated and was a widower.[297]

Obviously, if John Boucher predeceased the 1928 surrender meeting, he would have ceased to be *capable* of voting, let alone *eligible* to do so.

In contrast to these submissions are statements by elder Ted Knott and by Boucher's grandson, Ben Boucher. Knott recalled that he last saw John Boucher in the summer of 1932, 1933, or 1934 at Moss Lake, which was where Knott believed Boucher to have lived.[298] In a statutory declaration dated December 21, 1995, Ben Boucher stated that his grandfather was buried close to the railway in the Gage area near Hay Lake (also known as Moss Lake), north of Fairview, following his death at the age of 85 in the winter of 1936-37. Ben Boucher also attested to the fact that John Boucher was alive and residing near Hay Lake in 1928.[299]

The Commission believes it is important to deal with such allegations because, as we have noted, there is some evidence before us that, in the

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[295] Statutory Declaration of John Testawits, December 3, 1991, p. 7 (ICC Exhibit 10, tab A, Schedule 4).

[296] Indian Claims Commission, "Interview of Elders John Testawits and Ted Knott Taken at the Mile Zero Hotel, Grimshaw, Alberta," August 15, 1995, p. 6 (ICC Exhibit 6, tab B).

[297] ICC Transcript, September 6, 1995 (ICC Exhibit 6, tab C, p. 86) (Jerome Slavik).

[298] ICC Transcript, September 6, 1995 (ICC Exhibit 6, tab C, pp. 30 and 76-77) (Ted Knott).

[299] Statutory Declaration of Ben Boucher, December 21, 1995, p. 2 (ICC Exhibit 6, tab D).

Beaver surrender taken by Murison and Laird just two days after the Duncan's surrender, two individuals who reportedly took part in the meeting, including one who ostensibly signed the surrender document, were later shown to have been deceased before the meeting took place.[300] However, it is the Commission's view that the first-hand evidence of Ted Knott and Ben Boucher is compelling. We conclude that John Boucher was a male member of the Band of at least 21 years of age in 1928.

Conclusion

To summarize, we have determined that, in 1928, eight individuals were male members of the Duncan's Band of at least 21 years of age. The membership of four of those individuals – Joseph Testawits, Samuel Testawits, Eban Testawits, and James Boucher – is not at issue. We have further established that Emile and Francis Leg were band members by virtue of their long-standing, albeit intermittent, connection with the Band, and that John Boucher was still alive at the time of the surrender. Moreover, although the evidence is not definitive, we are also prepared to conclude that Alex Mooswah was a band member for the purposes of considering whether the quorum and majority assent requirements of the *Indian Act* were satisfied.

What Is the Meaning of the Phrase "Habitually Resides on or near, and Is Interested in the Reserve in Question"?

The next qualification for eligibility to participate in a surrender vote can be found in subsection 51(2) of the 1927 *Indian Act*, which states:

> 2. No Indian shall be entitled to vote or be present at such council, unless he habitually resides on or near, and is interested in the reserve in question.

It can be seen that there are two proscriptions in this provision: an Indian who is not habitually resident on or near, and interested in the reserve in question shall not ***take part in a surrender vote***, but, just as significantly, no such Indian is even permitted to be ***present*** at the meeting at which the decision to surrender is being considered. The question of whether a particular Indian attended or voted at a surrender meeting is likely to be relatively clear in most cases. The more difficult question – and the one which the parties have identified as the threshold issue in this inquiry – is whether that Indian habitually resided on or near, and was interested in the reserve in question. There are a number of elements to this provision that require legal interpretation, and we will address each in turn.

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[300] G.N. Reddekopp, "The Creation and Surrender of the Beaver and Duncan's Band's Reserves," pp. 111-12 and 126-27 (ICC Exhibit 5).

"The Reserve in Question"

In this case, the meaning of the phrase "the reserve in question" is problematic because not one, but seven, parcels of reserve land were surrendered. According to the First Nation, although Samuel and Eban Testawits resided on IR 151A, *none* of the seven listed voters or Alex Mooswah habitually resided on or near any of the reserves that were actually surrendered.[301] In drawing this conclusion, counsel relied on the statement by Secretary-Treasurer E.L. Lamont of the Municipal District of Peace that "[t]he above Indian Reserves situated within the boundaries of this Municipal District have been unoccupied for many years,"[302] and on Murison's report that "[t]he members of this band, in the past, have earned their living by hunting and working out for settlers and they have had no fixed place of abode."[303] Obviously, the implication of such a conclusion is that every individual on the voters' list was ineligible to vote, meaning that the surrender itself was a nullity. Moreover, even if Samuel and Eban Testawits might be considered eligible because they resided on IR 151A, only Eban assented to the surrender and signed the surrender document; the result, in the First Nation's submission, is that the surrender still fails because only one of two eligible voters – and not the required majority – participated at the surrender meeting and assented to the surrender.[304] Counsel continued:

> If there were no eligible voters then the overriding principle of preservation of the reserve lands for future generations would apply. Recalling that in 1928 the population of the band included 7 or 8 adult males, 27 women, and 15 children it would have been prudent to have waited to ascertain the potential future use among all other members in order to ensure that the reserves were not needed for future use and to determine what was in the best interests of all of the band members.[305]

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[301] Written Submission on Behalf of the Duncan's First Nation, November 12, 1997, p. 50; Jerome Slavik, Ackroyd, Piasta, Roth & Day, "Submission of Duncan's Indian Band to Specific Claims West re Wrongful Surrender of Duncan's Indian Reserves #151, and #151B - #151G," February 1996, pp. 18-20 (ICC Exhibit 10, tab B); Jerome Slavik, Ackroyd, Piasta, Roth & Day, to Manfred Klein, Specific Claims West, Indian and Northern Affairs Canada, "Claim of the Duncan's Indian Band Re: Wrongful Surrender of Indian Reserve 151H," November 21, 1995, p. 15 (ICC Exhibit 10, tab A).

[302] E.L. Lamont, Secretary-Treasurer, Municipal District of Peace, to Secretary, DIA, July 7, 1925, DIAND file 777/30-7-151A, vol. 1 (ICC Documents, p. 174).

[303] W. Murison, Inspector of Indian Agencies, to W.M. Graham, Indian Commissioner, October 3, 1928, NA, RG 10, vol 7544, file 29131-5, pt. 1 (ICC Documents, 255).

[304] Jerome Slavik, Ackroyd, Piasta, Roth & Day, "Submission of Duncan's Indian Band to Specific Claims West re Wrongful Surrender of Duncan's Indian Reserves #151, and #151B - #151G," February 1996, p. 20 (ICC Exhibit 10, tab B).

[305] Written Submission on Behalf of the Duncan's First Nation, November 12, 1997, p. 55.

In reply, Canada takes the position that habitual residence on or near, and interest in any one of the reserve parcels was sufficient to establish voter eligibility under subsection 51(2). Counsel contends that this position is supported by the definition of "reserve" in the 1927 *Indian Act*, which does not require a reserve to consist of a single contiguous parcel of land. Section 2 of the 1927 *Indian Act* states:

> **2.** In this Act, unless the context otherwise requires, ...
>
> (j) "reserve" means any tract *or tracts* of land set apart by treaty or otherwise for the use or benefit of or granted to a particular band of Indians, of which the legal title is in the Crown, and which remains so set apart and has not been surrendered to the Crown, and includes all the trees, wood, timber, soil, stone, minerals, metals and other valuables thereon or therein.[306]

In the present case, although there is some uncertainty in the record as to whether IR 151H and 151K were set apart in severalty or in the collective interest of the entire Duncan's Band, there is no such uncertainty with respect to IR 151 or 151B through 151G. All were clearly set apart for the benefit of the entire Band, and, in our view, each of them could have been considered as part of the Band's "reserve," as that term was defined in the 1927 statute. We consider the First Nation's approach to interpreting the phrase "the reserve in question" to be too narrow because, depending on the facts of a given case, it might entirely preclude a band from dealing with part of its reserve simply because no one lives on or near it. In the right circumstances, the remote location of a parcel of reserve land might be the major reason for a band to want to dispose of it, but, if the First Nation's argument is accepted, the band would be prevented from doing so.

We appreciate the argument that, in such cases, reserve lands should be preserved for future generations, but, as McLachlin J stated in *Apsassin*, we must attempt to strike a balance between autonomy and protection by honouring and respecting a band's decision to surrender its reserve unless it would be foolish, improvident, or exploitative to do so. We will consider whether the 1928 surrender was foolish, improvident or exploitative later in these reasons. For the moment, we must agree with Canada that, as long as an otherwise eligible band member habitually resides on or near, and is interested in *any portion* of the reserve in question, he should not be disqualified from voting with regard to the surrender of that portion or any other part of the reserve.

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[306] *Indian Act*, RSC 1927, c. 98, s. 2. Emphasis added.

"Interested in"

The First Nation describes the Indian interest in reserve land as "usufructuary," and relies on the *Shorter Oxford English Dictionary*[307] definition of that term as adopted by Estey J of the Supreme Court of Canada in *Smith v. The Queen*:

> Usufruct
> 1. *Law*. The right of temporary possession, use, or enjoyment of the advantages of property belonging to another, so far as may be had without causing damage or prejudice to it.
> 2. Use, enjoyment, or profitable possession (of something)....
>
> Usufructuary
> 1. *Law*. One who enjoys the usufruct of a property, etc.[308]

Counsel for the First Nation submits that being "interested in" a reserve means more than the mere self-interested pecuniary or commercial interest of "disinterested and distant members" to sell the land and realize their respective shares of the proceeds;[309] it also means more than simple membership in the Band:

> If any member of the Band could vote, as my friend contends, in short, if all members of the Band were automatically interested because of their beneficial interest, then having the phrase interested there would be redundant and all they would really need to say is all Indians residing on or near. They wouldn't need to say interested. Interested here in my view connotes something more than mere membership.[310]

Rather, a band member can only be truly interested in a reserve for the purposes of subsection 51(2), according to counsel, if he resides *on* it, or alternatively sufficiently *near* to it to permit him to make *actual use* of it for his residence, for economic functions such as farming, ranching, hunting, and trapping, or for cultural, spiritual, or religious purposes. There are thus two categories of eligible voters provided for by subsection 51(2), in counsel's submission: first, those band members who were habitually resident *on* the reserve in question, and, second, those who, while not habitually residing on the reserve, lived in very close physical proximity to the reserve in question and were making actual use of reserve lands.[311] This narrow interpretation is consistent, according to the First Nation, with the "legislative package" of provisions in the *Indian Act* by which the Crown has undertaken to protect Indians from the risk of losing property – including both reserve lands and chattels held on those reserves – which they hold by virtue of their status as Indians.[312] The result of this narrow interpretation is to deny the eligibility to vote on reserve surrenders to those non-resident members whose interest in surrender would be of a purely pecuniary nature.[313]

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[307] *Shorter Oxford English Dictionary* (1959), 2326.
[308] *Smith v. The Queen*, [1983] 1 SCR 554 at 569, [1983] 3 CNLR 161, 47 NR 132.
[309] Written Submission on Behalf of the Duncan's First Nation, November 12, 1997, p. 52.
[310] ICC Transcript, November 26, 1997, pp. 217-18 (Jerome Slavik).

Canada argues that, rather than *narrowing* the list of band members who are eligible to vote on a surrender, it makes more sense to *broaden* the interpretation of who is interested in the reserve so that the pool of eligible voters will be as large and representative of the band as possible. Doing so would arguably help prevent frauds and abuses, counsel urges, since a narrow interpretation of who is interested in a reserve might preclude a band from surrendering its reserves at all, or might allow surrenders to be authorized by only a few inhabitants of the reserve against the wishes and without the consent of otherwise qualified band members.[314] This means that "interested in" should be interpreted broadly to refer to "all band members who would be legally eligible to participate in the proceeds of the reserve's sale or lease."[315]

Canada further submits that the words "interested in" must mean something more than residency.[316] Counsel suggests that adopting the First Nation's narrow approach would mean that "only those members who have direct dealings with the reserve (such as using the reserve for some purpose, or having a house or other improvements on the reserve) would be entitled to vote"; in effect, this would, in counsel's view, equate interest in the reserve with residency, making the words "habitually resides on or near" redundant and thus meaningless.[317] Since a band member who did not reside on the reserve or maintain contact with those on the reserve would still be interested in the reserve by virtue of his membership and his consequent right to receive a per capita distribution of the sale proceeds and interest following surrender, Canada submits that all the voters on Murison's list were properly interested in the surrendered reserves.[318]

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[311] Written Submission on Behalf of the Duncan's First Nation, November 12, 1997, p. 49.

[312] Written Submission on Behalf of the Duncan's First Nation, November 12, 1997, p. 52; *Mitchell v. Peguis Indian Band* (1990), 71 DLR (4th) 193 at 226 (SCC), La Forest J.

[313] Written Submission on Behalf of the Duncan's First Nation, November 12, 1997, p. 52.

[314] Bruce Becker, Counsel, DIAND Legal Services, Specific Claims, to Jerome N. Slavik, Ackroyd, Piasta, Roth & Day, May 28, 1997, pp. 2-3 (ICC Exhibit 14).

[315] Written Submission on Behalf of the Government of Canada, November 17, 1997, p. 23. Canada initially argued that the words "interested in the reserve in question" were originally designed to distinguish between those members of a band who shared a collective interest in the band's reserve lands and those who did not share in such collective interest (e.g., severalty lands): Bruce Becker, Counsel, DIAND Legal Services, Specific Claims, to Jerome N. Slavik, Ackroyd, Piasta, Roth & Day, May 28, 1997, p. 2 (ICC Exhibit 14). However, after counsel for the First Nation pointed out that the phrase "interested in" first appeared in the *Indian Act* as early as 1876, whereas the concept of severalty was not introduced until Treaty 8 in 1899, Canada conceded that the phrase "interested in" could not have been developed to differentiate reserve lands from lands granted in severalty: Written Submission on Behalf of the Government of Canada, November 17, 1997, p. 23.

[316] Written Submission on Behalf of the Government of Canada, November 17, 1997, p. 23.

In the parties' submissions in the present inquiry, we are faced with two extreme positions. One is a very narrow approach, put forward by the First Nation, that would limit interest in the reserve to those living on or virtually adjacent to the reserve and making actual use of the reserve in some way, whether for residential, commercial, or spiritual purposes. The other is the polar opposite, advanced by Canada, which would sweep into the fold of eligible voters all band members having any treaty rights with respect to the reserve, regardless of whether those members made any use of, or had any physical or spiritual connection with, the reserve.

As Canada has argued, the First Nation's approach to interest in the reserve would render the words "on or near" virtually meaningless because that approach practically demands an eligible voter's residency in sight of the reserve. However, the First Nation contends that Canada's approach would similarly give little or no meaning to "on or near" because any band member with even a mere pecuniary interest in the reserve, and regardless of his location, would be eligible to vote.

If we leave aside for the moment the question of residence, it is the Commission's view that the proscription in subsection 51(2) against an Indian attending or voting at a surrender meeting unless he or she was interested in the reserve is intended to prevent surrender votes and meetings from being disrupted or influenced by *Indians* who were not sufficiently interested in the band's reserve lands. Nevertheless, in the Commission's view, we should be reluctant to limit the participation of ***band members*** in votes regarding the surrender of reserve lands belonging to those members and their children; accordingly, we must respect this interest and give it voice. Still, it must be recognized that the words "interested in" are intended to ensure the participation of those band members who have a reasonable connection – whether residential, economic, or spiritual – with the reserve. What constitutes a reasonable connection will clearly vary depending on the circumstances of a given case, and therefore it would not be wise or even necessary for us to attempt to enumerate all the criteria that might be considered to give rise to such a connection. Generally speaking, we would err on the side of inclusion, and we would observe that it is only those individuals who have little or no connection with the reserve who should be excluded from voting on the surrender of reserve lands. We have had careful regard for the First Nation's argument on this point but we cannot agree with its narrow interpretation of "interested in" since doing so might exclude *everyone* in the Band from being able to vote. There is no balance to this position and we cannot believe that it reflects Parliament's intention.

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[317] Written Submission on Behalf of the Government of Canada, November 17, 1997, p. 24; Bruce Becker, Counsel, DIAND Legal Services, Specific Claims, to Jerome N. Slavik, Ackroyd, Piasta, Roth & Day, May 28, 1997, p. 2 (ICC Exhibit 14).

[318] Written Submission on Behalf of the Government of Canada, November 17, 1997, pp. 23-24.

We find support for our conclusion in the recent decision of the Supreme Court of Canada in *Corbiere v. Canada (Minister of Indian and Northern Affairs)*.[319] That case is not directly on point, dealing as it does with whether the exclusion of Indians not "ordinarily resident on the reserve" from voting in band elections governed by subsection 77(1) of the *Indian Act* contravenes subsection 15(1) of the *Canadian Charter of Rights and Freedoms* and, if so, whether such contravention is nonetheless justifiable under section 1 of the *Charter*. Obviously, some of the fundamental premises underlying the *Corbiere* decision arise from its *Charter* context, which simply did not apply with regard to a surrender of reserve land in 1928. Nevertheless, certain statements by L'Heureux-Dubé J in her concurring reasons on behalf of a four-member minority of the Court highlight the competing considerations at play. On one hand, there are matters in which all band members have an interest, regardless of whether they live on- or off-reserve, but at present off-reserve members are entirely precluded by subsection 77(1) from participating in electing the band council to deal with those matters. As L'Heureux-Dubé J stated:

> The wording of s. 77(1), therefore, gives off-reserve band members no voice in electing a band council that, among other functions, spends moneys derived from land owned by all members, and money provided to the band council by the government to be spent on all band members. The band council also determines who can live on the reserve and what new housing will be built. ***The legislation denies those in the position of the claimants a vote in decisions about whether the reserve land owned by all members of the band will be surrendered.*** In addition, members who live in the vicinity of the reserve, as shown by the evidence of several of the plaintiffs in this case, may take advantage of services controlled by the band council

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[319] *Corbiere v. Canada (Minister of Indian and Northern Affairs)* (May 20, 1999), No. 25708 (SCC).

> such as schools or recreational facilities. *Moreover, as a practical matter, representation of Aboriginal peoples in processes such as land claims and self-government negotiations often takes place through the structure of Indian Act bands. The need for and interest in this representation is shared by all band members, whether they live on- or off-reserve. Therefore, although in some ways, voting for the band council and chief relates to functions affecting reserve members much more directly than others, in other ways it affects all band members.*[320]

Similarly, as McLachlin and Bastarache JJ stated on behalf of the majority:

> The impugned distinction perpetuates the historic disadvantage experienced by off-reserve band members by denying them the right to vote and participate in their band's governance. *Off-reserve band members have important interests in band governance which the distinction denies. They are co-owners of the band's assets. The reserve, whether they live on or off it, is their and their children's land.* The band council represents them as band members to the community at large, in negotiations with the government, and within Aboriginal organizations. Although there are some matters of purely local interest, which do not as directly affect the interests of off-reserve band members, the complete denial to off-reserve members of the right to vote and participate in band governance treats them as less worthy and entitled, not on the merits of their situation, but simply because they live off-reserve.[321]

On the other hand, L'Heureux-Dubé J was prepared to acknowledge that on-reserve band members have special interests in the reserve that off-reserve members do not:

> *There are clearly important differences between on-reserve and off-reserve band members, which Parliament could legitimately recognize.* Taking into account, recognizing, and affirming differences between groups in a manner that respects and values their dignity and difference are not only legitimate, but necessary considerations in ensuring that substantive equality is present in Canadian society. The current powers of the band council, as discussed earlier, include some powers that are purely local, affecting matters such as taxation on the reserve, the regulation of traffic, etc. In addition, *those living on the reserve have a special interest in many decisions made by the band council. For example, if the reserve is surrendered, they must leave their homes, and this affects them in a direct way it does not affect non-residents.* Though non-residents may have an important interest in using them, educational or recreational services on the reserve are more likely to serve residents,

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[320] *Corbiere v. Canada (Minister of Indian and Northern Affairs)* (May 20, 1999), No. 25708, para 78 (SCC), L'Heureux-Dubé J. Emphasis added.

[321] *Corbiere v. Canada (Minister of Indian and Northern Affairs)* (May 20, 1999), No. 25708, para 17 (SCC), McLachlin and Bastarache JJ. Emphasis added.

> particularly if the reserve is isolated or the non-residents live far from it. Many other examples can be imagined.[322]

What the Commission takes from these statements is that there may legitimately be different voting rights for various members of a band depending on the subject matter of the vote. Ultimately, the scheme recommended by L'Heureux-Dubé J – essentially identical to the solution proposed by the majority – would confer voting rights on off-reserve band members, subject to recognition being given to the "special interests" of those residing on the reserve. Nevertheless, we perceive that the underlying philosophy of the judgments is to include in some way, rather than exclude outright, off-reserve band members in votes that relate to the surrender of reserve lands. Although the *Charter* had no effect with respect to a surrender in 1928, we perceive a similar philosophy at play in subsection 51(2) of the 1927 *Indian Act*, wherein Parliament chose not to entirely exclude off-reserve band members but to limit participation in surrender votes to those who habitually resided on or near, and were interested in the reserve.

We see no reason why it should be assumed that the only interest that the wide-ranging members of the Duncan's Band would have in their reserve would be to see it sold so they could realize their respective shares of the proceeds. In the Commission's view, although members of the Duncan's Band continued their traditional way of life that took them away from their reserves in many cases for most of each year, little had changed since the days when Treaty 8 was signed and the reserves were set apart for the Band. The very fact that it was necessary to set apart ten parcels of reserve land for the Band in the first place is a testament to the dispersed nature of the Band's membership and its chosen means of earning its livelihood. There is no basis for suggesting that, notwithstanding their diverse locations and way of life, the members of the Duncan's Band had any less interest in their reserves in 1928 than they had in the earlier years when those reserves were established. The treaty negotiations of 1899 foreshadowed the day when advancing settlement would result in competition for land and might make hunting and trapping a less viable proposition, so provision was made to protect the Indians' position by securing reserves for them at an early date.

The fact that some of those reserve lands were later surrendered – at a time when hunting and fishing remained the primary livelihood of band members – goes to the heart of the question of whether Canada breached any fiduciary obligations in permitting the surrender to take place. However, it does not necessarily indicate that the *sole* interest of *all* non-resident band members in their reserve lands would have been to surrender those lands in exchange for a per capita distribution of a portion of the sale proceeds and annual payments of interest on the balance. Nor can the converse be assumed – that the members of the Band resident on one of the reserves would *not* be motivated by the lure of a cash payment and annual distributions of interest, particularly when the reserve lands that would have to be sold to generate these payments were standing largely idle and providing little in the way of economic return.

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[322] *Corbiere v. Canada (Minister of Indian and Northern Affairs)* (May 20, 1999), No. 25708, para. 94 (SCC), L'Heureux-Dubé J.

We will return to the application of these principles after we have considered the meaning of the term "habitually resides on or near."

"Habitually Resides on or near"

We have already discussed the meaning of the phrase "the reserve in question." It now remains to determine what is meant by being habitually resident on or near that reserve.

There would seem to be little doubt that residence *on* the reserve in question means residence within its geographical boundaries, regardless of whether that reserve is composed of a single contiguous parcel or, as in the present case, a number of parcels separated in some instances by several miles. The more difficult questions are what constitutes "near" the reserve, and what is necessary to be considered habitually resident.

Looking first at the question of habitual residence, the First Nation submits that

> residency would require indicia of a degree of continuity and intent to remain. Although a member following the trapping mode of life would be called upon to travel and spend time away from the reserves he or she could still be considered a resident if habitually returning to the reserve and having established a primary residence where most of the year was spent and which they would consider and refer to as their residence.[523]

In reaching this conclusion, counsel relied in particular on the decision of the Supreme Court of Canada in *Attorney-General of Canada v. Canard*,[524] a case in which the courts were asked to decide, for estate administration purposes, whether a deceased Indian, at the time of his death, ordinarily resided on the Fort Alexander reserve. The evidence showed that each year Canard moved his family from the reserve into a bunkhouse on a farm off-reserve where he took summer work. Two days after moving to the farm in 1969, he died in a traffic accident. Although most of the judges in the Supreme Court were of the view that the case turned on constitutional issues arising out of the *Canadian Bill of Rights*, Beetz J more thoroughly addressed the residence issue by adopting the following reasons of Dickson JA (as he then was) of the Manitoba Court of Appeal:

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[523] Written Submission on Behalf of the Duncan's First Nation, November 12, 1997, pp. 49-50.

[524] *Attorney-General of Canada v. Canard* (1975), 52 DLR (3d) 548 (SCC).

> The words "ordinarily resident" have been judicially considered in many cases, principally income tax cases or matrimonial causes. Among the former: *Thomson v. M.N.R.*, [1946] 1 D.L.R. 689 at p. 701, [1946] S.C.R. 209, [1946]C.T.C. 51, in which Rand, J., said: "It is held to mean residence in the course of the customary mode of life of the person concerned, and it is contrasted with special or occasional or casual residence"; *Levene v. Inland Revenue Com'rs*, [1928] A.C. 217 at p. 225, in which Viscount Cave, L.C., said: "... I think that it connotes residence in a place with some degree of continuity and apart from accidental or temporary absences". Among the latter: *Stransky v. Stransky*, [1945] 2 All E.R. 536 at p. 541, in which Karminski, J., applied the test: "where ... was the wife's real home?" Perdue, J.A., of this Court, in *Emperor of Russia v. Proskouriakoff* (1908), 18 Man. R. 56 at p. 72, held that the words "ordinarily resident" simply meant where the person had "his ordinary or usual place of living".
>
> Applying any of these tests it would seem to me that at the time of his death Alexander Canard was ordinarily resident on the reserve. He normally lived there, with some degree of continuity. His ordinary residence there would not be lost by temporary or occasional or casual absences.
>
> When one seeks to interpret the phrase "ordinarily resident" within the context of the *Indian Act* one is re-enforced in the view which I have expressed. Section 77(1) of the Act gives a band member "ordinarily resident on the reserve" the right to vote for the chief of the band and for councillors. Parliament could not have intended that an Indian would lose such voting rights, and lose the right to have his children schooled pursuant to s. 114 *et seq.* if he left the reserve during the summer months to guide or gather wild rice or work on a nearby farm.[325]

It can be seen from this passage that, unlike counsel for the First Nation, Dickson JA did not stipulate that "ordinarily resident" requires an individual to have "established a primary residence where most of the year was spent." Rather, he referred to an individual's "ordinary or usual place of living," where a person normally lived with some degree of continuity and which would not be lost by temporary or occasional or casual absences in the summer to guide, gather rice, or work as a temporary farm labourer. We see no reason why temporary winter absences for hunting and trapping purposes should be treated any differently.

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[325] *Attorney-General of Canada v. Canard* (1975), 52 DLR (3d) 548 at 568-69 (SCC), Beetz J

Canada submits that "ordinarily resident" means something different from "habitually resident."[326] Counsel relies on a decision of the Alberta Court of Appeal in *Adderson v. Adderson*[327] which dealt with the term "habitual residence," not in the context of the *Indian Act* but rather under that province's *Matrimonial Property Act*.[328] In that case, a wife obtained a decree of divorce in Hawaii but commenced a matrimonial property action in Alberta, claiming that the province had constituted the couple's "last joint habitual residence" under subsection 3(1) of the statute. Laycraft CJA noted that the concept of "habitual residence" had not been previously considered by the court, and continued:

> One object of adopting the new term according to the learned authors of *Dicey and Morris on the Conflict of Laws*, 10th ed. (1980), at p. 144, was to avoid the rigid and arbitrary rules which had come to surround the concept of "domicile". While "domicile" is concerned with whether there is a future intention to live elsewhere, "habitual residence" involves only a present intention of residence. There is a weaker animus....
>
> A number of text writers ... have placed "habitual residence" somewhere between "residence" and "domicile" in the tests necessary to establish it. Evidence of intention does not have the importance it has in tests for "domicile" but may be a factor in some cases. In *Dicey and Morris on the Conflict of Laws*, 10th ed. (1980), at pp. 144-5 it is said:
>
>> It is evident that "habitual residence" must be distinguishable from mere "residence". The adjective "habitual" indicates a quality of residence rather than its length. Although it has been said that habitual residence means "a regular physical presence which must endure for some time", it is submitted that the duration of residence, past or prospective, is only one of a number of relevant factors; there is no requirement that residence must have lasted for any particular minimum period.[329]

It is interesting to note that, in reviewing the case authorities, Laycraft CJA considered *R. v. Barnet London Borough Council, Ex p. Nilish Shah*,[330] in which Lord Scarman of the English House of Lords adopted Lord Denning's conclusion in the Court of Appeal that "ordinarily resident" means that "the person must be habitually and normally resident here." Laycraft CJA commented:

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[326] ICC Transcript, November 26, 1997, pp. 175-76 (Perry Robinson).

[327] *Adderson v. Adderson* (1987), 36 DLR (4th) 631 (Alta CA).

[328] *Matrimonial Property Act*, RSA 1980, c. M-9.

[329] *Adderson v. Adderson* (1987), 36 DLR (4th) 631 at 633-34 (Alta CA).

[330] *R. v. Barnet London Borough Council, Ex p. Nilish Shah*, [1983] 2 AC 309 (HL), affirming [1982] QB 688 (CA).

> Lord Scarman ... said at p. 342 that the adverb "habitually" imports "residence adopted voluntarily and for settled purposes". Expanding on the meaning of "settled purposes" he said at p. 344:
>
> > And there must be a degree of settled purpose. The purpose may be one; or there may be several. It may be specific or general. All that the law requires is that there is a settled purpose. This is not to say that the "propositus" intends to stay where he is indefinitely; indeed his purpose, while settled, may be for a limited period. Education, business or profession, employment, health, family, or merely love of the place spring to mind as common reasons for a choice of regular abode. And there may well be many others. All that is necessary is that the purpose of living where one does has a sufficient degree of continuity to be properly described as settled.
>
> The word "habitual" was used in that case merely as one of the words defining ordinary residence. I do not consider it to be of assistance to equate the two terms. Lord Scarman's discussion of "settled purposes" is, however, useful as a factor in the consideration of present intention as applied to "habitual residence".[331]

After referring to other texts and cases, Laycraft CJA concluded:

> I adopt the views of the text writers, which, though somewhat variously expressed, state that the term "habitual residence" refers to the quality of residence. Duration may be a factor depending on the circumstances. It requires an animus less than that required for domicile; it is a midpoint between domicile and residence, importing somewhat more durable ties than the latter term. In my view, it is not desirable, indeed it is not possible, to enter into any game of numbers on the duration required. All of the factors showing greater or less present intention of permanence must be weighed.[332]

In summary, we take from these authorities that an individual's "habitual" place of residence will be the location to which that individual customarily or usually returns with a sufficient degree of continuity to be properly described as settled, and will not cease to be habitual despite "temporary or occasional or casual absences." Although such residence entails "a regular physical presence which must endure for some time," there is no fixed minimum period of time and the duration of residence, past or prospective, is only one of a number of relevant factors, the quality of residence being the overriding concern. It is not clear to us that there is a significant difference between "habitual" and "ordinary" residence, and similarly we are unsure whether it matters on the facts of this case. Although there is evidence that the eight eligible voters moved around a great deal in pursuit of their traditional hunting and trapping way of life, there does not appear to be any real dispute that, in general, there were particular locations in which they were habitually resident at the time of the 1928 surrender. The real question is whether those locations were situated "near" the reserve in question.

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[331] *Adderson v Adderson* (1987), 36 DLR (4th) 631 at 635 (Alta CA)
[332] *Adderson v Adderson* (1987), 36 DLR (4th) 631 at 636 (Alta CA)

Counsel for both parties agree that "near" is a relative term, but beyond that they differ as to how it should be interpreted. The First Nation submits that the term is ambiguous and uncertain, and, as such, it should, in the spirit of *Nowegijick*, be liberally construed, with the doubtful expression resolved in favour of the Indians. Given counsel's argument that the thrust of the *Indian Act* is to protect reserve lands for future generations of band members, then the procedures for permitting reserves to be surrendered should be strictly observed by narrowing the scope of those permitted to attend surrender meetings and participate in surrender votes. Accordingly, counsel submits that

> ... "near" ... should be defined and understood as sharing common characteristics with similar terms such as 'close', 'proximate', 'neighbouring', 'adjacent', 'contiguous', 'bordering', 'abutting', or 'adjoining'. If they [band members] lived in Berwyn, if they lived in Brownvale and had a use or interest in the reserve, yes. But at Eureka River, at Gage which is the other side of Fairview, at Spirit River or west of Spirit River? We don't think that is near at all.[333]

In other words, the First Nation contends that "the term 'near' should be narrowly construed to circumstances where an Indian resided off-reserve but in very close proximity to the reserve."[334] This is in keeping, according to counsel, with legal authorities such as *R. v. Lewis*[335] and *Mitchell v. Peguis Indian Band*[336] which have confined phrases like "on the reserve" to mean within the territorial limits of the reserve.[337]

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[333] ICC Transcript, November 25, 1997, p. 101 (Jerome Slavik)
[334] Written Submission on Behalf of the Duncan's First Nation, November 12, 1997, p. 52
[335] *R. v. Lewis*, [1993] 5 WWR 608 (BCCA)
[336] *Mitchell v. Peguis Indian Band* (1990), 71 DLR (4th) 193 (SCC)
[337] Written Submission on Behalf of the Duncan's First Nation, November 12, 1997, p. 51

Contrasting this position is Canada's view that "near," while a relative term, is not indicative of any particular distance. Rather, whether an Indian is habitually resident near a reserve should be determined as a question of fact in each case,[338] with factors such as the lifestyle of band members, and the distances travelled by them in accordance with that lifestyle, taken into account.[339] In this case, counsel submits that the wide distances travelled by band members for hunting and trapping purposes during most of the year "were comparable to or greater than the distance between the place where the individuals may have habitually resided and the band's reserves";[340] in other words, relative to the areas covered by band members in the course of pursuing game, the distances between the reserve and the members' respective places of habitual residence could be considered "near." According to counsel:

> What I'm suggesting is that even if individuals who were Band members were frequenting, and trapping, and hunting and fishing in a broad area, which may have either encompassed the reserves in question or at least been equidistant from the points at which they hunted and trapped, I would suggest that a more expansive definition of "near" will broaden the voter base, which makes more sense.
>
> Now, the contention will be by the Claimants, of course, that this in fact has the opposite effect in that the reason for restricting the voters list in this case to people who are habitually resident on [the reserve] is so that ten people who are band members living in Toronto can't sell a reserve out from underneath the five or six band residents who are living on a reserve where they're actually using it. And that's the Claimant's general contention.
>
> I would agree in that case. I mean if you have individuals that have no association with these reserves and they are living in Toronto, that's when on or near makes sense. But I mean in this case they're all up there in the area. The suggestion is that it makes more sense to have a more expansive voters list rather than the two people that the Claimants are suggesting. Two people could surrender a reserve with a population of 53, and that's what the Claimants are committed to on their submissions.[341]

Counsel concluded that it would be ironic "if the very reason that would motivate band members to pursue a surrender – lack of use as evidenced by diminished residence – would prove to be a technical bar that prevented the free exercise of that band's choice to surrender its reserve."[342]

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[338] Bruce Becker, Counsel, DIAND Legal Services, Specific Claims, to Jerome N. Slavik, Ackroyd, Piasta, Roth & Day, May 28, 1997, p. 3 (ICC Exhibit 14).

[339] Written Submission on Behalf of the Government of Canada, November 17, 1997, p. 25.

[340] Written Submission on Behalf of the Government of Canada, November 17, 1997, p. 26.

[341] ICC Transcript, November 26, 1997, pp. 181-82 (Perry Robinson).

In reply, the First Nation objects that the Crown's approach of judging "near" by the Band's pattern of mobility would prevent the establishment of any concept of nearness that could be consistently applied in varying factual circumstances, and, as such, would be "grossly result oriented and contrary to the *Act*."[343]

The Commission's task with respect to this issue is a difficult one because, in essence, we are asked to decide how near is "near," or, perhaps more accurately, how far can "near" be. The parties appear to agree that band members resident in Toronto would not be "near," but there is no agreement on where the line should be drawn such that those on one side are sufficiently "near" to be eligible to vote at a surrender meeting, while those on the other are not. We believe it would be arbitrary to pick a certain distance that should apply in all cases, since the circumstances of various bands can be so different. We cannot agree with the First Nation's position that "near" should take its flavour from words like "adjacent" or "contiguous," because those terms connote a degree of proximity that was unrealistic given the Band's background and way of life.

Such a conclusion does not, as suggested by counsel for the First Nation, run afoul of the principle in *Nowegijick* that doubtful expressions are to be resolved in favour of the Indians. As we stated in our report regarding the treaty land entitlement claim of the Kahkewistahaw First Nation, a doubtful expression may work to the benefit of a band in one case but to the detriment of a band in another:

> We disagree that using the date of first survey rather than the date of selection is "clearly prejudicial to the Indians," or that using the date of selection "would ensure that all Indians receive land and are treated equally, fairly and consistently." It is not accurate to suggest that one approach is universally favourable to the Indians and the other is consistently prejudicial. Calculating a band's population on the date of selection would work to the band's detriment if the band's population was increasing, just as calculating the population on the date of first survey would be disadvantageous if the population was decreasing.[344]

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[342] Written Submission on Behalf of the Government of Canada, November 17, 1997, p. 26; ICC Transcript, November 26, 1997, p. 184 (Perry Robinson).

[343] Written Submission on Behalf of the Duncan's First Nation, November 12, 1997, p. 53; ICC Transcript, November 25, 1997, p. 101 (Jerome Slavik).

[344] Indian Claims Commission, *Inquiry into the Treaty Land Entitlement Claim of the Kahkewistahaw First Nation* (Ottawa, November 1996), (1998) 6 ICCP 21 at 81.

Likewise, in some cases choosing a narrow interpretation of "near" might work to the advantage of a band, whereas in other cases a broad construction might best serve band interests. The point is that, whatever interpretation is selected, it must still be chosen on the basis of principle and not simply on the basis of whichever interpretation suits the needs of the band in a given situation.

That being the case, we feel that Canada's approach to treating "nearness" as a question of fact to be decided on the circumstances of each individual case is appropriate, particularly in Treaty 8 where both Canada and the Indians have recognized since the date of treaty that band members engaged in traditional hunting, fishing, and trapping pursuits were unlikely to remain in close physical association with their reserves. As we have seen, Indian Commissioner William Graham made particular note of this trait in the summer of 1928:

> You will understand that it is a difficult matter to get these Indians together in order to treat with them. I have already taken this matter up with regard to the Swan River Band, and find *at the present time they are scattered all over the country* – some working for the farmers, some on sections and others employed on the construction of the highway. *All are more or less distant from the reserves* so that when we do succeed in getting them together for the purpose of discussing terms of surrender with them, our officer should be very fully informed regarding the views of the Department.[345]

Similarly, John Testawits stated:

> And when you ask questions where did you stay for the winter, you know, it's a kind of a silly question for me because I was a trapper. All my trapping days I spent in the wintertime and I don't come out until the beaver hunt – until about the 15th of June, and then you're asking where you lived all winter. You're living in a cabin, looking after your trap line all winter long. There's no place to go, but just look after your traps and that's it. That's where you stay. Your residency is there.
>
> *I had 75 square miles of trap line* northeast of Hotchkiss, 7 cabins, and I would go from one cabin to another. You don't just go around in one circle, because you have a whole toboggan full of frozen squirrels, you take them to the second cabin, and you got to wait for them to thaw out, you would wait and skin them, and there's foxes, lynx and everything. That's your pastime for the winter....
>
> So you're asking a difficult question over and over again, why do you stay there and, you know, where do you stay in the winter. He lives in his cabin, with his trap

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[345] W.M. Graham, Indian Commissioner, to DSGIA, June 19, 1928. DIAND, PARC file 777/30-7-151A, vol. 1 (ICC Documents, p. 208). Emphasis added.

> line. That's his pastime right until June 15th. *We stayed there until the beaver hunt was over and that's it, and we come out and lived in a settlement like civilized people.*[346]

What we take from these statements and other evidence in this case is that the male members of the Duncan's First Nation engaged in traditional pursuits of hunting, fishing, and trapping to earn their livelihood, and that this often took them far afield from their reserves. When the season for tracking game ended, they generally returned to their respective home locations where, for the purposes of our analysis, we would consider them to be "habitually resident." The question of whether those habitual residences were sufficiently near the reserve is one that must be answered on a case-by-case basis for each of the individuals involved, having regard for the general use of the reserves by the Band, the residence patterns of each individual, and band members' mobility as hunters and trappers relative to the more sedentary agricultural lifestyle adopted by southern prairie bands. It is to that task that we now turn.

Did Any Ineligible Indians Attend or Vote at the Surrender Meeting?

In broad terms, Canada takes the position that all the band members on the voters' list prepared by William Murison – and in particular the five who voted at the September 19, 1928, surrender meeting – resided on or near, and were interested in the Duncan's Band reserves, and were accordingly eligible to attend the meeting and to vote.[347] However, counsel further submits, relying on the reasons of Killeen J in *Chippewas of Kettle and Stony Point*, that, even if one or more of the latter five were in fact ineligible, their presence and participation in the surrender vote, depending on the facts of the case, would not necessarily taint or invalidate the surrender.[348]

In contrast, the Duncan's First Nation submits that none of the seven band members enumerated on the voters' list prepared by William Murison resided near the reserves in question[349] and that, of the five who voted, only Joseph and Eban Testawits made any use of the reserves.[350] In that event, assuming there were no eligible voters, then the underlying philosophy of the *Indian Act* to preserve reserve lands for future generations should have applied, with the prudent course in the best interest of the Band being to prevent the surrender until the potential use of the reserves by future members could be ascertained.[351]

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[346] ICC Transcript, September 6, 1995 (ICC Exhibit 6, tab C, pp. 34-35) (John Testawits). Emphasis added.

[347] Written Submission on Behalf of the Government of Canada, November 17, 1997, pp. 25-26.

[348] ICC Transcript, November 26, 1997, pp. 168-69 and 183 (Perry Robinson).

[349] Written Submission on Behalf of the Duncan's First Nation, November 12, 1997, p. 53.

[350] Written Submission on Behalf of the Duncan's First Nation, November 12, 1997, p. 55: "[T]here is ample evidence that Emile Legge, John Boucher, and James Boucher made no use whatsoever of any of the Duncan's Reserves."

Alternatively, if the phrase "the reserve in question" can refer to any of the Band's 10 parcels of reserve land in 1928, then the First Nation is prepared to concede that Samuel and Eban Testawits were eligible to vote at the surrender meeting – but only if it could be demonstrated that they made sufficient use of IR 151A (on which they resided) or one or more of the other parcels to be considered "interested" in them.[352] In that event, the Crown still would not have achieved the necessary majority assent to the surrender since only one of these two (Eban Testawits) voted, and the other (Samuel Testawits) is known to have been opposed to the surrender.[353] In short, the First Nation asserts that the Crown's representatives permitted ineligible voters to take part in the vote and to determine the Band's position on the surrender,[354] and that the surrender should therefore be considered invalid.

As for Canada's submission that *Chippewas of Kettle and Stony Point* means that the presence of ineligible voters and other voters at a surrender meeting does not necessarily invalidate the surrender, the First Nation argues that *Chippewas of Kettle and Stony Point* dealt with the presence of a *non-Indian* third party at a surrender meeting, which is a different question; since subsection 51(2) of the 1927 *Indian Act* prevents certain *Indians* from voting at a surrender meeting, and since the Federal Court of Appeal in *Apsassin* concluded that subsections 51(1) and (2) are related, this means that subsection (2), like subsection (1), must be treated as a mandatory procedural requirement.[355] According to counsel, subsection 51(2) of the 1927 *Indian Act* was fundamental to the purpose of preserving reserve lands for future generations by preventing them from being lost as a result of individual pecuniary interests in a moment of vulnerability or greed.[356]

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[351] Written Submission on Behalf of the Duncan's First Nation, November 12, 1997, p 55

[352] Written Submission on Behalf of the Duncan's First Nation, November 12, 1997, pp 50 and 55

[353] ICC Transcript, November 25, 1997, pp 104-05 (Jerome Slavik). Counsel's statement that Samuel Testawits was opposed to the surrender is based on the evidence of John Testawits Statutory Declaration of John Testawits, December 3, 1991, p. 5 (ICC Exhibit 10, tab A, Schedule 4); Written Submission on Behalf of the Duncan's First Nation, November 12, 1997, pp 35-36; ICC Transcript, November 25, 1997, pp 62-64 (Jerome Slavik)

[354] Written Submission on Behalf of the Duncan's First Nation, November 12, 1997, p 69

[355] ICC Transcript, November 26, 1997, p 217 (Jerome Slavik)

[356] ICC Transcript, November 26, 1997, p 216 (Jerome Slavik)

The parties' submissions require the Commission to decide whether any of the Indians who attended or voted at the surrender meeting were ineligible to do so by virtue of subsection 51(2). If not, then the surrender would be valid. If some of the participating Indians *were* ineligible, we will have to consider whether the provisions of subsection 51(2) were *mandatory* and thus imperative, implying that the surrender would be invalid if they were not met, or merely *directory* and of no obligatory force, thus validating the surrender but perhaps exposing Canada to other forms of relief in favour of the First Nation.

We will now review on a case-by-case basis the evidence and submissions of the parties with regard to the eight adult male members of the Duncan's Band.

Joseph Testawits

Although the First Nation has submitted that Joseph Testawits did not attend the 1928 surrender meeting, we have already concluded, based on the evidence before us, that he did in fact attend and vote in favour of the surrender.

Counsel for the First Nation submits that there are three bases for finding that Joseph Testawits's habitual residence was not on or near the reserve:

> Joseph's residence was in Spirit River. We know this because, first of all, his wife [Angela] was from that area. Second of all, he was married in the area and, thirdly, his children were born in Spirit River. And the key documentation here is the birth certificate of Joseph Testawits' daughter born in the spring of 1928. The parents gave on the birth certificate their residence as being at Spirit River.
>
> So the parents considered themselves to be resident at Spirit River. Although he probably spent most of his time at the Michel Testawits' camp located west of Spirit River. This would have been a distance of over a hundred miles from the Duncan's Reserves, close to it anyway. You can draw it on a map, but it's a significant distance in those days. It's a significant distance today. So he subjectively considered himself to be resident at Spirit River.[357]

Joseph's visits with relatives on the reserve during the summers may have constituted *use* of the reserve, but they did not, in counsel's submission, amount to residence *near* the reserve.[358]

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[357] ICC Transcript, November 25, 1997, pp. 74-75 (Jerome Slavik)
[358] ICC Transcript, November 25, 1997, p. 102 (Jerome Slavik)

Canada responds by pointing to evidence suggesting that Joseph may in fact have been resident on IR 151A at the time of the surrender. John Testawits recalled that Joseph spent most of his time each year from September to June at Michel Testawits's camp west of Spirit River,[359] but, when he was not trapping at Spirit River, "[h]e was at 151A" and in fact spent most of his life there.[360] John also gave evidence that, although Joseph would trap at Spirit River during the winter months, his wife, Angela, would "stay home, likely"[361] – that home, in counsel's submission, being on IR 151A. Canada acknowledged John Testawits's evidence that Joseph moved back to the reserve only in 1929 or 1930 and built one of five homes that John recalled as "brand new" when he returned to the reserve in 1931.[362] However, counsel also points to Angela Testawits's interview on the Duncan's Reserve in 1973 in which she stated: "My son was already a big boy when my husband sold the reserves. *We were living here already* but the selling of reserves took place at Fairview."[363] Counsel submits that, since duration is not the determining factor in establishing "habitual residence," it can be argued that, although Joseph may have been away for a significant portion of each year at Spirit River, his then-present intention was to reside at the reserve, given that he returned regularly to his wife there when he was not trapping. Even if Joseph Testawits habitually resided near Spirit River and merely visited the reserve in hunting's summer off-season, he still resided near the reserve, in Canada's view, and was entitled to vote on the surrender.[364]

Eban Testawits

The parties agree that, until his untimely death in 1931 or 1932, Eban Testawits resided on IR 151A.[365] Indeed, counsel for the First Nation considers that, of the five voters on Murison's list, Eban Testawits may have been the only one eligible to vote.[366]

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[359] ICC Transcript, September 6, 1995 (ICC Exhibit 6, tab C, p. 48) (John Testawits).

[360] Indian Claims Commission, "Interview of Elders John Testawits and Ted Knott Taken at the Mile Zero Hotel, Grimshaw, Alberta," August 15, 1995, p. 21 (ICC Exhibit 6, tab B).

[361] ICC Transcript, September 6, 1995 (ICC Exhibit 6, tab C, p. 50) (John Testawits).

[362] ICC Transcript, September 6, 1995 (ICC Exhibit 6, tab C, pp. 48 and 88) (John Testawits and Jerome Slavik).

[363] Interview of Angela Testawits, December 5, 1973, p. 3 (ICC Exhibit 6, tab G).

[364] Written Submission on Behalf of the Government of Canada, November 17, 1997, p. 25.

[365] Indian Claims Commission, "Interview of Elders John Testawits and Ted Knott Taken at the Mile Zero Hotel, Grimshaw, Alberta," August 15, 1995, pp. 21-22 (ICC Exhibit 6, tab B); ICC Transcript, September 6, 1995 (ICC Exhibit 6, tab C, p. 88) (Jerome Slavik); ICC Transcript, November 25, 1997, p. 75 (Jerome Slavik); ICC Transcript, November 26, 1997, p. 175 (Perry Robinson).

[366] ICC Transcript, November 25, 1997, p. 75 (Jerome Slavik).

Samuel Testawits

Because Samuel Testawits did not attend or vote at the surrender meeting, the only reason it becomes necessary to establish his residency and interest in the reserve is to determine whether the requirements of section 51 of the 1927 *Indian Act* regarding quorum and majority assent at the surrender meeting were satisfied. John Testawits recalled that Samuel lived in a log shack by the spring on IR 151A until his death in 1933.[367] The First Nation contends that, other than Eban Testawits, Samuel was the only male band member aged 21 years to reside on one of the Band's reserves.[368] However, despite being the band member whose attendance at the surrender meeting would likely have been most easily accomplished, Samuel was absent – a fact that, in light of Samuel's apparent opposition to the surrender, the First Nation considers as raising suspicions that a surrender meeting never happened.[369]

Canada makes no submission regarding Samuel since, in its view, the First Nation has conceded that Samuel habitually resided on or near, and was interested in the reserve in question.[370]

John Boucher

The evidence regarding John Boucher's place of residence is inconsistent. John Testawits, who never met or knew John Boucher, gave evidence that Boucher's permanent residence was a log home on the southwest corner of IR 151A.[371] He continued:

> John Boucher died before I returned home in 1931. At that time, he was a very old man. James Boucher occupied John's house when he died. When I returned from the Grouard Mission in 1931, I recall very clearly that James Boucher was living in a log house on the #151A Indian Reserve which had been the residence of John Boucher. To the best of my knowledge, prior to 1928, neither John nor James Boucher lived on any of the Reserves by the river [IR 151B to IR 151G]. They lived year-round in a log cabin on #151A in the southwest corner.[372]

In contrast to this evidence is the statutory declaration of Ben Boucher – the son and grandson of James and John Boucher, respectively – who deposed:

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[367] Interview of Ben Basnett, February 25, 1992, p. 34 (ICC Exhibit 6, tab A); Statutory Declaration of John Testawits, December 3, 1991, p. 3 (ICC Exhibit 10, tab A, Schedule 4).

[368] Written Submission on Behalf of the Duncan's First Nation, November 12, 1997, p. 29.

[369] Written Submission on Behalf of the Duncan's First Nation, November 12, 1997, p. 29.

[370] ICC Transcript, November 26, 1997, p. 178 (Perry Robinson).

[371] Statutory Declaration of John Testawits, December 3, 1991, p. 3 (ICC Exhibit 10, tab A, Schedule 4).

[372] Statutory Declaration of John Testawits, December 3, 1991, p. 7 (ICC Exhibit 10, tab A, Schedule 4).

> 4. My grandfather was John Boucher who was a member of the Duncan's Indian Band. He lived 2½ miles north of Gage near an area which was called Hay Lake [also known as Moss Lake]....
>
> 6. To the best of my knowledge, my grandfather never lived on the Duncan's Indian Reserve. In 1928 he was living near Hay Lake, north of Fairview.
>
> 7. My grandfather was 85 years old when he died in the winter of 1936-37. He was buried near the railroad in the Gage area, one mile west of where he was living.[573]

Similarly, Ted Knott recounted that he last saw John Boucher in the 1932-34 period at Moss Lake, which is where Knott always saw Boucher and believed that he lived.[574] The Commission also notes that, in the 33 years from the signing of Treaty 8 in 1899 through the last year he was paid in 1931, John Boucher was paid in 16 of those years in the vicinity of IR 152, including 14 times at Dunvegan and once each at Hay Lake and Fairview. In the remaining 17 years, he is reported to have been paid at Peace River Landing (three times), Peace River Crossing (nine times), on the Duncan's reserve (twice), and once each at Grouard, Vermilion, and Old Wives Lake.[575]

In addressing all the foregoing evidence prior to the oral submissions in this inquiry, Canada wrote:

> While it is arguable based upon this information that John Boucher resided on 151A, the evidence of both Ben Boucher and Ted Knott, and the fact that John Boucher regularly received his treaty annuity payments in the vicinity of the Beaver Reserve No 152 and Dunvegan when other Band members were paid at the Duncan's Reserve, suggest that John Boucher likely habitually resided in the Moss Lake area. However, we are of the view that this was "near" the reserve ... and that he was entitled to vote on the surrender.[576]

According to counsel for Canada, Moss Lake is situated about one mile from Fairview, which is in turn located approximately 18 miles (29 kilometres) from IR 151A.[577]

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[573] Statutory Declaration of Ben Boucher, December 21, 1995, pp 1-2 (ICC Exhibit 6, tab D)

[574] ICC Transcript, September 6, 1995 (ICC Exhibit 6, tab C, pp 30 and 76) (Ted Knott)

[575] Provincial Archives of Alberta, Treaty Annuity Paylists, Duncan's Band, 1910-36 (ICC Documents, pp 716-83); Paylist Comparison Database (ICC Exhibit 15, vol 1)

[576] Bruce Becker, Counsel, DIAND Legal Services, Specific Claims, to Jerome N Slavik, Ackroyd, Piasta, Roth & Day, May 28, 1997, p 10 (ICC Exhibit 14)

[577] ICC Transcript, November 26, 1997, p 180 (Perry Robinson)

In the First Nation's submission, however, John Boucher did not reside on or use the Band's reserves and had no affiliation or connection with them.[378] Moreover, Boucher's residence is not in doubt, given Canada's acknowledgment that he resided in the Moss Lake area in 1928. His real affiliation, according to counsel, was with the Beaver Band, since he lived and died at Moss Lake on IR 152 and married the daughter of the Beaver Chief.[379] In short, the First Nation contends that John Boucher, his son James, and the Leg brothers "were classic examples of Indians who were on the membership list but did not reside near and certainly had no interest" in the reserve.[380]

James Boucher

John Testawits recalled that, in 1931, James Boucher lived in a log house on IR 151A that had been John Boucher's residence.[381] He further stated that James Boucher resided on IR 151A most of his life,[382] for at least part of that time in one of the five houses built in 1929 or 1930. It appears that the house was first occupied by Annie Laprete,[383] and that James Boucher did not move in until after her death in the early 1930s.[384] This information seems consistent with Ben Boucher's statutory declaration:

> 3. My father is James Boucher and my mother, Justine, was a Beaver Indian from the Moss Lake area, which was located near the present location of the Town of Fairview....
>
> 8. My father was born at Fairview. In 1928, my father, James Boucher, was residing at Moss Lake on the Beaver Indian Reserve #152. He was living there when I left for Grouard Mission School in 1933. He moved to Duncan's Reserve in 1933 or 1934 when I was away at school. I was told this by Sister Mary at Grouard.

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[378] Written Submission on Behalf of the Duncan's First Nation, November 12, 1997, p. 55; ICC Transcript, November 25, 1997, p. 101 (Jerome Slavik).

[379] ICC Transcript, November 25, 1997, pp. 71-72 (Jerome Slavik).

[380] ICC Transcript, November 26, 1997, p. 101 (Jerome Slavik).

[381] Statutory Declaration of John Testawits, December 3, 1991, p. 7 (ICC Exhibit 10, tab A, Schedule 4).

[382] Interview of Ben Basnett, February 25, 1992, p. 35 (ICC Exhibit 6, tab A); Indian Claims Commission, "Interview of Elders John Testawits and Ted Knott Taken at the Mile Zero Hotel, Grimshaw, Alberta," August 15, 1995, p. 22 (ICC Exhibit 6, tab B).

[383] Annie Laprete's name was given a number of different spellings on paylists over the years, but she is no doubt the "Anna La Pretre" referred to later in this report in an excerpt from John Testawits's statutory declaration. Statutory Declaration of John Testawits, December 3, 1991, p. 3 (ICC Exhibit 10, tab A, Schedule 4).

[384] ICC Transcript, September 6, 1995 (ICC Exhibit 6, tab C, pp. 48-49) (John Testawits).

> 9. When I was 10 years old, I went to the Mission School in Grouard. When I returned from Grouard for summer holidays, I lived with my father on the Duncan's Indian Reserve. I finished school at age 17. I had grade 10.
>
> 10. I am Metis as both my father and I enfranchised from the Duncan's Band. I left the Duncan's Reserve in 1938.[385]

In his February 25, 1992, interview, Ben Basnett stated that James Boucher "didn't really live anywhere" and just camped wherever he liked, spending his winters in the north and "then they'd go back down to Fairview and put in the summer."[386] Ted Knott recalled that James Boucher "spent a lot of time" at Hay Lake north of Gage.[387]

In response to the foregoing evidence, Canada submits:

> The evidence of Ben Boucher, supported to a limited extent by the evidence of Ted Knott and Ben Basnet, and the fact that James Boucher was born in Fairview, married a woman from the Beaver Band and regularly received his treaty annuity payments in the vicinity of the Beaver Reserve No. 152 and Dunvegan, suggest that James Boucher likely habitually resided in the Moss Lake area. However, we are of the view that this was "near" the reserve for the reasons mentioned previously, and that he was entitled to vote on the surrender.[388]

The First Nation contends that James Boucher did not reside on the Duncan's reserves, made no use of them, and had no affiliation or connection with them.[389] Rather, James was married to a Beaver woman; did not move to the Duncan's reserves until 1933 or 1934, where he resided for only a few years before enfranchising with his son Ben; and was affiliated by marriage, residency, and social ties with the Beaver Band. Given Canada's recognition that James Boucher resided in the Moss Lake area in 1928, the First Nation urges the Commission to conclude that he did not reside on or near, and was not interested in the Band's reserves.[390]

Emile Leg

The individual giving rise to the most debate in this inquiry is Emile Leg. Ben Basnett indicated that Emile "didn't live particularly anywhere," but just "put up a teepee and stayed anywhere." However, he also stated that Emile was

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[385] Statutory Declaration of Ben Boucher, December 21, 1995, pp. 1-2 (ICC Exhibit 6, tab D).
[386] Interview of Ben Basnett, February 25, 1992, p. 26 (ICC Exhibit 6, tab A).
[387] ICC Transcript, September 6, 1995 (ICC Exhibit 6, tab C, p. 31) (Ted Knott).
[388] Written Submission on Behalf of the Government of Canada, November 17, 1997, p. 44.
[389] ICC Transcript, November 25, 1997, p. 101 (Jerome Slavik).
[390] ICC Transcript, November 25, 1997, p. 72 (Jerome Slavik).

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always on the Beaver Indian reserves at Eureka River or Fairview, and lived most of his life in the vicinity of Eureka River about 70 miles from Berwyn and IR 151. As to where Emile trapped, "they'd come out in the spring and nobody knew where they went out half of the time."[391] He believed that Emile lived most of his life in the Eureka River area where he trapped.[392]

Similarly, Ted Knott observed that Emile lived near Worsley, which is west of Eureka River some 80 miles from the Grimshaw/Berwyn area.[393] He recalled that Emile trapped at Hay River, located north and west of Worsley, and would return to Herb Lathrop's trading post at Worsley for part of the summer. Emile would also spend part of each summer picking berries at Fort St John before returning to Lathrop's post at the end of August to purchase supplies prior to returning to the north to trap for the winter.[394] Knott added:

> 6. During the years of my acquaintance with Emile Legg, I believe that what I have described above was his consistent pattern of movement throughout the year. It is my belief that Emile Legg had no settled place of residence, and followed a traditional Indian lifestyle moving through parts of north western Alberta and north eastern British Columbia. These areas are all located at a considerable distance from the Indian reserves where members of the Duncan's Band had their residence.
>
> 7. I have frequented the Duncan's Indian Reserve all my life and I never saw Emile Legg on the Reserve. To my knowledge, Emile Legg never resided on Indian Reserves held for the use and benefit of the Duncan's Band.
>
> 8. It is my belief that Emile Legg had no close connection with any Indian Band, pursuing as he did a traditional itinerant Indian lifestyle.[395]

The preceding evidence is consistent with John Testawits's statements that he did not know Emile Leg other than through his mother, who told him that the Leg brothers were interpreters for the Indian agents and thus just passed through, and did not live on, the Duncan's reserves.[396] He understood that

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[391] Interview of Ben Basnett, February 25, 1992, pp. 8, 10, and 13-14 (ICC Exhibit 6, tab A).

[392] Statutory Declaration of Ben Basnett, July 7, 1992, p. 1 (ICC Exhibit 10, tab A, Schedule 5).

[393] Indian Claims Commission, "Interview of Elders John Testawits and Ted Knott Taken at the Mile Zero Hotel, Grimshaw, Alberta," August 15, 1995, p. 8 (ICC Exhibit 6, tab B).

[394] ICC Transcript, September 6, 1995 (ICC Exhibit 6, tab C, p. 21) (Ted Knott); Statutory Declaration of Ted Knott, September 25, 1992, p. 2 (ICC Exhibit 10, tab A, Schedule 6).

[395] Statutory Declaration of Ted Knott, September 25, 1992, p. 2 (ICC Exhibit 10, tab A, Schedule 6).

[396] Interview of Ben Basnett, February 25, 1992, p. 23 (ICC Exhibit 6, tab A); ICC Transcript, September 6, 1995 (ICC Exhibit 6, tab C, pp. 72-73) (John Testawits); Statutory Declaration of John Testawits, December 3, 1991, p. 8 (ICC Exhibit 10, tab A, Schedule 4).

Emile's "home place" was at Eureka River,[397] where he stayed most of the time and belonged to the Beaver Band.[398]

The First Nation submits that Emile and Francis Leg took treaty with the Beaver Band in 1900 and transferred to the Duncan's Band with their widowed mother in 1905. When Emile died at age 34 in Eureka River, he had lived there for most of his adult life, having never lived on or made any use of the Duncan's reserves.[399] In short, counsel contends that Emile Leg did not reside near those reserves and had no interest in them, thereby disqualifying him from participating in the 1928 surrender meeting.[400]

For its part, Canada acknowledges that Emile Leg married a woman from the Beaver Band in 1914 and received his treaty annuities for most of the 1920s preceding the surrender at Dunvegan or on the Beaver reserve. Counsel further accepts that Emile died at Eureka River in 1934 after living in the district for 16 years, and that he was buried on the Clear Hills Indian Reserve of the Horse Lake Band (formerly part of the Beaver Band) north of Eureka River. Nevertheless, arguing that "a more expansive view of 'near' makes sense," counsel concluded:

> Based upon the foregoing information, it appears likely that Emile Legg was habitually resident in the Clear Hills/Worsley area. However, we are of the view that this was near the reserve ... and that he was entitled to vote on the surrender.[401]

Francis Leg

Like Samuel Testawits, Francis Leg did not attend or vote at the surrender meeting, but it is necessary to consider whether he was eligible to do so for purposes of establishing whether the quorum and majority assent requirements of section 51 of the 1927 *Indian Act* were met. Unfortunately, the evidence regarding Francis Leg is sketchy. As we have already seen, John Testawits recalled his mother saying that the Legs did not live on the Duncan's reserve, but instead passed through only when they were required to do so to interpret for the Indian agent.[402] Testawits did not know Francis Leg, but understood him to be a member of the Beaver Band rather than the

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[397] Indian Claims Commission, "Interview of Elders John Testawits and Ted Knott Taken at the Mile Zero Hotel, Grimshaw, Alberta," August 15, 1995, p. 9 (ICC Exhibit 6, tab B).

[398] ICC Transcript, September 6, 1995 (ICC Exhibit 6, tab C, p. 43) (John Testawits).

[399] ICC Transcript, November 25, 1997, p. 74 (Jerome Slavik); ICC Transcript, September 6, 1995 (ICC Exhibit 6, tab C, pp. 85-86) (Jerome Slavik).

[400] ICC Transcript, November 25, 1997, p. 101 (Jerome Slavik).

[401] Written Submission on Behalf of the Government of Canada, November 17, 1997, pp. 38-40; ICC Transcript, November 26, 1997, p. 181 (Perry Robinson).

[402] Interview of Ben Basnett, February 25, 1992, p. 23 (ICC Exhibit 6, tab A).

Duncan's Band.[403] Neither Ben Basnett nor Ted Knott provided any additional information regarding Francis Leg.

The First Nation submits that, as with Emile Leg, Francis was not affiliated or connected with the Duncan's Band and did not reside on or make use of the reserve.[404] Indeed, the First Nation goes so far as to say that "[t]here is no record of Francis Legg ever being resident on the Duncan's Reserve ... his residence whereabouts was unknown,"[405] and accordingly he was not resident near, or interested in the reserve. Canada again responds that, with an expansive definition of "near," Francis Leg was properly considered an eligible voter.[406]

Alex Mooswah

There is even less evidence with regard to Alex Mooswah than for Francis Leg, and the evidence we do have is conflicting. Ted Knott claims to have known Mooswah when he was in his early twenties, and that the last time he saw Mooswah was at Ben Basnett's post at Eureka River. However, at one point in his remarks, Knott suggested that this was in 1923 or 1924, and at another he said that it may have been the summer or fall of 1935.[407] Annuity paylist information discloses that, following the death of his father, Modeste Mooswah, in the 1919 influenza epidemic, Alex Mooswah continued to be paid on Modeste's ticket until 1935. He was paid four times with his father at Dunvegan or on the Beaver Reserve from 1915 to 1919, but was generally shown as being paid with the rest of the Duncan's Band during the 1920s, including 1928. In the 1930s he regularly received his annuities at Fort St John, British Columbia.

From this information the First Nation argues that Alex Mooswah "perhaps should have been on the voters' list and was not."[408] As we have already seen, Canada merely suggests that Mooswah was too young to be an eligible voter.

Conclusions

It is the Commission's view that, in assessing the eligibility of these individuals, it is important to recognize the realities of the Treaty 8 area in 1928. The people of the Duncan's Band, like those of many other bands in Treaty 8, engaged in hunting and trapping as their means of subsistence. They were mobile and travelled far afield each year to maintain their traplines and pursue game. Although they may not have lived on any reserve, or even in close proximity to a reserve, for much of any given year, they nevertheless returned to their reserves from time to time and collected their annuities together. Despite their nomadic ways, most of these people still considered their reserves – particularly IR 151A – to be the "home" to which they were lured through long, albeit sporadic, association. As John Testawits commented in his statutory declaration of December 3, 1991:

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[403] ICC Transcript, September 6, 1995 (ICC Exhibit 6, tab C, p. 44) (John Testawits); Statutory Declaration of John Testawits, December 3, 1991, p. 8 (ICC Exhibit 10, tab A, Schedule 4).

[404] ICC Transcript, November 25, 1997, p. 101 (Jerome Slavik).

[405] ICC Transcript, November 25, 1997, p. 74 (Jerome Slavik).

[406] ICC Transcript, November 26, 1997, p. 181 (Perry Robinson).

[407] ICC Transcript, September 6, 1995 (ICC Exhibit 6, tab C, pp. 33 and 78-79) (Ted Knott).

[408] ICC Transcript, September 6, 1995 (ICC Exhibit 6, tab C, p. 90) (Jerome Slavik).

> 9. The Duncan Testawit's family lived on #151A prior to the Treaty and after Treaty. This was known as the "Duncan's family Reserve". *Members of the family and community as a whole moved back and forth between the different Reserves during the different times of the year*. Most, however, had permanent residences of log homes on #151A and visited the other Reserves. The log houses on #151A were occupied by John Boucher (S.W. corner), Anna La Pretre (at the spring), Joseph Testawit's (N.W. corner), Julia Testawit's (at the spring), Margaret or Jimmy Testawit's (son of Joseph) (South S.W.), and Samuel Testawit's (at the spring)....
>
> 33. I recall my uncle, Samuel, telling me, and I remember at that time, that *the people moved around a great deal*. They would hunt for moose south of the Peace River and would trap in that area during the winter. They would spend the summer months on the Reserve at #151A and part of their time at #151 which was known as the Berwyn Reserve. They also travelled a great deal around the region seeking work from the few settlers that were there at that time.[409]

It appears from these statements that IR 151A formed the focal point for the Band, with the other reserve parcels being visited from time to time. In these circumstances, the Commission concludes that it would be artificial to strain the meaning of the terms "interested in" or "near" in a way that would disentitle many of the people of Treaty 8, let alone the members of the Duncan's Band, from being able to participate in a decision as important as the disposition of their reserves.

From the foregoing evidence and submissions, we have reached the following conclusions:

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[409] Statutory Declaration of John Testawits, December 3, 1991, pp. 3 and 10-11 (ICC Exhibit 10, tab A, Schedule 4).

- Since the parties apparently agree that both Eban and Samuel Testawits habitually resided on, and were interested in IR 151A, we conclude that, although Eban was the only one of these two to actually attend and vote at the surrender meeting, each was eligible to do so.

- With regard to Joseph Testawits, John Testawits asserted that Joseph did not build a house and move to IR 151A until 1929 or 1930, but Angela Testawits stated that the family had already moved to the reserve by the time of the 1928 surrender. For reasons we have already expressed, we find that Angela's evidence has greater immediacy and weight. John's comments are not entirely inconsistent, either, since a house built in 1928 might still have looked just as new on John's return in 1931 as one built in 1929 or 1930, and in any event the family may have already taken up residence on the reserve even if the new house *was* built in one of the latter two years. We are also of the view that the fact that a new house was built or was to be built is evidence of Joseph Testawits's intent as of 1928 to make IR 151A his permanent home. It is also noteworthy that Angela Testawits remained "at home" on IR 151A while Joseph hunted and trapped, but that he returned to her during the summer off-season. We conclude that Joseph Testawits habitually resided on or near, and was interested in the reserve, and was therefore eligible to vote at the 1928 surrender meeting.

- The evidence with regard to Alex Mooswah is incomplete, but the Commission has already found that he was a member of the Band and old enough to be eligible to vote. The First Nation submits that he should have been on the voters' list, and Canada's only stated objection is with regard to age. We conclude, therefore, that, at the time of the surrender, he habitually resided on or near, and was interested in the reserve, making him eligible to vote on its surrender.

- The Commission has reflected at great length on the circumstances of Emile Leg and his brother Francis. Given the importance of permitting band members to participate in surrender proceedings affecting their reserve lands, we are reluctant to exclude the Leg brothers from the list of eligible voters under subsection 51(2) of the 1927 *Indian Act*. Nevertheless, we must conclude that they were not eligible to vote. The two were members of the Duncan's Band in name only, having been born into the Beaver Band and being children when that Band was admitted to Treaty 8 in 1899. They transferred to the Duncan's Band with their widowed mother in 1905, but they lived virtually all of their adult lives at Eureka River near the Beaver Band's IR 152C, a significant distance from the Duncan's reserves. John Testawits stated that he did not know the Legs and that they apparently returned to the Duncan's reserves only occasionally with the Indian agent to act as translators and to receive their annuities. The evidence of Ben Basnett and Ted Knott indicates that the Legs were habitually resident in the vicinity of Eureka River, and Knott stated that he had never seen Emile Leg on the Duncan's reserve. Although the treaty annuity paylists indicate that the Legs were paid consistently with the Duncan's Band prior to 1919, initially under their mother and thereafter on their own tickets, and that they received annuities on the Duncan's reserve on at least three occasions in the mid-1920s, we are not convinced that occasional returns to the reserve for the sole purpose of receiving annuities represented a reasonable connection with the Band or the reserves for the purposes of subsection 51(2). Despite Joseph Testawits, Eban Testawits, and James Boucher all certifying in the surrender affidavit that "no Indian was present or voted at such council or meeting who was not a habitual resident on the reserve of the said band of Indians and interested in the land mentioned in the said release or surrender,"[410] we conclude that the Legs were neither habitually resident on or near, nor sufficiently interested in the reserve to be eligible to participate in and vote at the 1928 surrender meeting.

- The evidence regarding John and James Boucher, unlike that with respect to the Legs, is that they had a much closer connection with the Duncan's Band reserves, having spent most of their lives in and around those lands. They habitually resided at Moss Lake in 1928, a distance of only 18 miles (29 km) from IR 151A and relatively much closer than the Legs to the Band's reserves. The evidence before the Commission also indicates that the members of the Duncan's Band often congregated and received their annuities at IR 152, on which Moss Lake was situated, which would place the Bouchers regularly in the midst of their fellow band members. Indeed, in the year of the surrender itself, Agent Laird commented that he found most of the members of the Band on IR 152 when he arrived to distribute annuities earlier that year. Moreover, whereas Ted Knott and John Testawits gave evidence suggesting that the Legs were rarely, if ever, on the Duncan's reserves, there is no such evidence with regard to the Bouchers.

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[410] Surrender Affidavit, September 19, 1928 (ICC Documents, p. 261).

In fact, it appears from the evidence of John Testawits that, following the surrenders of the Duncan's reserves and Beaver IR 152 in 1928, John Boucher may have moved to one of five new houses on IR 151A, where, after his death, he was succeeded by Annie Laprete and later his son James. It also appears that both Bouchers, like other band members, travelled extensively in the area between IR 152 and the various reserves of the Duncan's Band. In our view, these facts demonstrate a reasonable connection to the Band and its reserves, and we conclude that both John and James Boucher resided on or near, and were interested in the reserves. Accordingly, they were eligible to participate and vote at the 1928 surrender meeting.

In summary, we find that, of the seven individuals on the voters' list prepared by William Murison – Joseph Testawits, Eban Testawits, Samuel Testawits, John Boucher, James Boucher, Emile Leg, and Francis Leg – five were eligible to be there – the three Testawits brothers and the Bouchers. Emile and Francis Leg did not qualify to vote, meaning that, given our conclusion that Alex Mooswah *should* have been on the list, the Band's quorum and voting majority requirements fell to be determined on the basis of six eligible voters.

Other Participants at the Surrender Meeting

It will be recalled that subsection 51(2) of the 1927 *Indian Act* provides that "[n]o Indian shall be entitled to vote or be present at such council, unless he habitually resides on or near, and is interested in the reserve in question." Although it is clear that only five individuals *voted* at the meeting, it is less clear how many other Indians were *present* at the meeting and whether any of those in attendance were prohibited by subsection 51(2) from being there. The parties have made no submissions on this point, but the Commission has noted some evidence that might suggest the presence at the surrender meeting of Indians having no interest in the Duncan's reserves.

In his request for a second payment of $50 from the proceeds of the public auction to each member of the Band, Indian Agent Harold Laird reported on October 29, 1929, that "*a majority of the members of this Band were present on the Beaver Reserve No. 152 when surrenders were taken from both Bands* and a promise was made to the Beaver Band of a payment of $50.00 to each member in the fall of 1928 and a second one of

$50.00 in 1929."[411] This statement suggests that the members of the two Bands, whom Indian Commissioner William Graham referred to as "all living as one band,"[412] may have all been in attendance at the surrenders of each other's reserves.

We have also had regard for the following evidence of Angela Testawits:

> Richard [Lightning]: When your husband was dealing with the reserves, how many years ago is that, do you remember?
>
> Angela: I don't really know. If I could see the people who were there, *three of them are still alive that were there.*
>
> Richard: What are their names?
>
> Angela: *One is my brother, his name is Francis Naposis*, the other one is in Grouard or High Prairie, I really would like to see him. He is a whiteman who understands a bit of Cree, he would know exactly how much land we had. Maybe he is dead I haven't heard of him in a long time. I told John Spring (Testawich) to inquire about him, he would know everything. He was the one who led the surveyors. I don't remember his name. If I was in Grouard I would know his name by asking. The other man is Phillip Knot, he would know how many years ago it took place.[413]

Of the individuals identified by Angela Testawits, the "whiteman" is irrelevant because, not being an Indian, his attendance was not prohibited by subsection 51(2). Similarly, the 1939 annuity paylist for the Duncan's Band indicates that Emile Leg's widow, Rosalie Laglace, married a Phillip Knott who was characterized on the paylist as a "halfbreed," which, if true, would mean that the surrender could not be challenged on the basis of his presence since he was technically not an Indian either. Angela herself, although not eligible to vote because of her gender, was not forbidden from attending because, like her husband, Joseph, she presumably resided on or near, and was interested in the reserves. However, Francis Naposis, if Indian, would have been precluded from attending the surrender meeting because his name did not appear on any of the treaty annuity, surrender, or interest paylists as a member of the Duncan's Band.

It appears from the September 21, 1928, affidavit relating to the surrender of the Beaver Band's IR 152 that the "Francis Naposis" identified by Angela

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[411] Harold Laird, Indian Agent, to the Assistant Deputy and Secretary, DIA, October 29, 1929, NA, RG 10, vol. 7544, file 29131-5, pt 2 (ICC Exhibit 6, tab F).

[412] W.M. Graham, Indian Commissioner, to Secretary, DIA, August 31, 1929, NA, RG 10, vol. 7544, file 29131-9, pt 2 (ICC Documents, p. 348).

[413] Interview of Angela Testawits, December 5, 1973, p. 5 (ICC Exhibit 6, tab G).

Testawits may have been the "François Napasis" showing as one of the principal men attesting to that Band's surrender.[414] There is evidence that Angela was born at Spirit River before Treaty 8 was concluded,[415] so her brother's membership and status as a principal man in the Beaver Band would hardly be surprising. Moreover, in reporting on a visit to the Lesser Slave Lake Agency in early 1931, Murison wrote with regard to the poor land purchased for what was then known as the Dunvegan and Grande Prairie Band:

> This reserve was purchased at the time of the surrender of Reserves Nos. 152 and 152A in 1928, at a cost of $6.75 per acre. After seeing the land, I am convinced that the Indians paid altogether too much for it, and that $3.00 an acre would have been a much fairer price and nearer its value. It is a question if this band will ever make use of six sections of land. There are only very few people living there – the Chief, Neepee Pierre, with a family of 3, *Francis Napacis and family of 5*, Louis Mosquitoe's widow and children, 6 in the family, and three old widows. The balance of the band make their homes at Hay Lakes and Fort St. John....
>
> The other faction of this band reside [sic] 170 or more miles south by road, at Horse Lakes.[416]

Although it seems clear that Francis Naposis was a member of the Beaver Band and would have been prohibited from attending the surrender meeting, we cannot conclude in the circumstances that the vague references by Laird and Angela Testawits constitute definitive evidence that members of the Beaver Band, while assembled in the same location as the Duncan's Band, ***actually attended*** the Duncan's surrender meeting. To the contrary, the evidence demonstrates that separate meetings were held with the two bands on September 19 and 21, 1928.

However, since Emile Leg attended and voted at the Duncan's surrender meeting despite being ineligible to do so, subsection 51(2) of the 1927 *Indian Act* was violated even if Francis Naposis and other members of the Beaver Band did ***not*** attend the Duncan's surrender meeting. It therefore becomes necessary to determine whether that violation invalidates the 1928 surrender by the Duncan's Band. Our decision on this question will turn on whether the provisions of subsection (2) were mandatory or merely directory.

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[414] Surrender Affidavit for Beaver Band's IR 152, September 21, 1928 (ICC Exhibit 10, tab A, Schedule 19, p. 1). There may in fact have been more than one Francis Naposis. In his paper, Neil Reddekopp refers to a "Francis Napasis" who was in his mid-80s in 1972, which would make Naposis close in age to Angela Testawits. However, Reddekopp refers to Napasis as Angela's *uncle* rather than her brother: G.N. Reddekopp, "The Creation and Surrender of the Beaver and Duncan's Band's Reserves," pp. 128-29 (ICC Exhibit 5).

[415] Interview of Angela Testawits, December 5, 1973, p. 1 (ICC Exhibit 6, tab G).

[416] W. Murison, Inspector of Indian Agencies, to W. Graham, Indian Commissioner, March 6, 1931, NA, RG 10, vol. 7544, file 29131-5, pt 2, C-14813. Emphasis added.

Is Subsection 51(2) of the 1927 *Indian Act* Mandatory or Merely Directory?

Subsection 51(2) provides that "[n]o Indian *shall* be entitled to vote or be present at such council, unless he habitually resides on or near, and is interested in the reserve in question." The First Nation argues that, assuming that at least one of the five individuals who attended and voted at the 1928 surrender meeting was ineligible to do so, subsection 51(2) renders the entire surrender void *ab initio*. The basis for this position is that the word "shall" in the subsection is presumed to be mandatory, thus imperatively prohibiting attendance and voting by non-resident and uninterested Indians. The only exception would be where such strict compliance works a serious inconvenience – for example, in circumstances where the failure to comply does not go to the heart of the matter in question or undercut the purpose of the provision.[417]

Counsel submits that, in the present case, subsections 51(1) and (2) not only use the term "shall" but also state that no surrender shall be "valid or binding" unless the terms of those subsections are satisfied. The implication of this language, according to the First Nation, is that those subsections must be considered to be a mandatory procedure to prevent abuse, fraud, coercion and exploitation and to ensure that a band's consent to a surrender is informed and voluntary.[418] In contrast, subsections (3) and (4) merely provide evidence of compliance with subsections (1) and (2); therefore, failure to comply with subsections (3) and (4) will not invalidate a surrender where the intentions of the Indians are otherwise clear and untainted, as was the case in *Apsassin*.[419] Counsel concludes that, since the Crown has sought to formalize the surrender process in the *Indian Act* and in Scott's instructions to his Indian agents,[420] the Commission "should be wary," as McLachlin J stated in *Apsassin*, "of discarding carefully drafted protections created under validly enacted legislation."[421]

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[417] Written Submission on Behalf of the Duncan's First Nation, November 12, 1997, p. 40; ICC Transcript, November 25, 1997, p. 84 (Jerome Slavik).

[418] Written Submission on Behalf of the Duncan's First Nation, November 12, 1997, p. 42.

[419] Written Submission on Behalf of the Duncan's First Nation, November 12, 1997, pp. 40-41.

[420] Written Submission on Behalf of the Duncan's First Nation, November 12, 1997, p. 45.

[421] ICC Transcript, November 25, 1997, p. 86 (Jerome Slavik).

Canada's initial position in response is that the Crown satisfied all of the requirements of section 51 since all of the voters at the 1928 surrender meeting resided on or near, and were interested in, the Band's reserves.[422] Nevertheless, based on the reasons of Killeen J in ***Chippewas of Kettle and Stony Point***, Canada recognizes that subsection (1) is mandatory in terms of requiring a separate surrender meeting and majority assent of a band's adult male members at that meeting since those aspects of section 51 represent "the very essence of the protection of band autonomy in the decision-making process."[423] However, counsel suggests that other aspects of subsection (1) may be merely directory. Noting that Estey J in ***Cardinal*** referred to the criteria in section 51 as simply "precautions" or "precautionary measures," counsel asserts that some of those criteria were intended to be directory, and that indeed in ***Apsassin*** the criteria in subsection (3) have already been determined to be exactly that.[424] Similarly, some of the criteria in subsections (1) and (2) may also be directory only. Counsel asks:

> ... what about a situation where all other requirements of the surrender were met except that a meeting was not called in accordance with the rules of the band? Although a s. 51(1) requirement, it is arguable that if the failure to call the meeting according to band rules was the sole "flaw" in the surrender process, then the surrender might not be invalid. The test outlined by McLachlin [J] in *Apsassin* in the context of s. 51(3), the requirement for the surrender affidavit, might still apply. To determine whether any surrender requirement is mandatory or directory, it must be measured against the object and purpose of the statute. If reading the requirement as mandatory would work a "serious inconvenience", then an argument can be made that the requirement is directory only.[425]

Canada further submits that, even if subsection (1) is mandatory, "[subsection] 51(2) is directory only, and the attendance of an ineligible voter at the meeting itself, and I would submit the signature on the document, does not necessarily invalidate the entire surrender."[426] For example, counsel argues that, if all 100 individuals on a voters' list vote in favour of a surrender, it might still make sense to give effect to the surrender if one person on the list turns out to be ineligible. In that event, the word "shall" might be more appropriately construed as being directory only.[427]

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[422] Written Submission on Behalf of the Government of Canada, November 17, 1997, pp 15 and 22

[423] ICC Transcript, November 26, 1997, p. 156 (Perry Robinson).

[424] Written Submission on Behalf of the Government of Canada, November 17, 1997, p. 14

[425] Written Submission on Behalf of the Government of Canada, November 17, 1997, p. 15, footnote 23

[426] ICC Transcript, November 26, 1997, p. 174 (Perry Robinson).

[427] ICC Transcript, November 26, 1997, pp. 231-33 (Perry Robinson).

Mandatory v. Directory Generally

Before turning to the authorities dealing with section 51 of the 1927 *Indian Act*, it is instructive to review the two leading cases dealing generally with mandatory and directory statutory provisions. The first of these is the classic judgment in *Montreal Street Railway Company v. Normandin*,[428] a case involving a claim that a jury verdict should be set aside due to the failure of the sheriff to update voters' lists to empanel juries. The Privy Council established the essential principles to guide the courts on the issue:

> ... the statutes contain no enactment as to what is to be the consequence of non-observance of these provisions. It is contended for the Appellants that the consequence is that the trial was *coram non judice* and must be treated as a nullity.
>
> It is necessary to consider the principles which have been adopted in construing statutes of this character, and the authorities so far as there are any on the particular question arising there. The question whether provisions in a statute are directory or imperative has very frequently arisen in this country, but it has been said that *no general rule can be laid down, and that in every case the object of the statute must be looked at.... When the provisions of a statute relate to the performance of a public duty and the case is such that to hold null and void acts done in neglect of this duty would work serious general inconvenience or injustice to persons who have no control over those entrusted with the duty, and at the same time would not promote the main object of the legislature, it has been the practice to hold such provisions to be directory only, the neglect of them, though punishable, not affecting the validity of the acts done.*[429]

More recently, the Supreme Court of Canada has given further consideration to the issue of mandate and direction in *British Columbia (Attorney General) v. Canada* (the *Vancouver Island Railway* case).[430] In that case, Iacobucci J for the majority would have preferred not to deal with the issue of mandatory and directory provisions, since in his view his reasons adequately disposed of the appeal without the need to do so. However, given that McLachlin J in dissent agreed with the British Columbia Court of Appeal on the issue, he felt obliged to comment:

> ... I must ... accept that whenever a statute uses the word "shall", there is a great temptation to emboss upon the word a conclusory label. Is the word "shall" in s. 268(2) [of the *Railway Act*[431]] "mandatory" or "directory" in its effect? McLachlin J.

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[428] *Montreal Street Railway Company v. Normandin*, [1917] AC 170 (PC).
[429] *Montreal Street Railway Company v. Normandin*, [1917] AC 170 at 174-75 (PC). Emphasis added.
[430] *British Columbia (Attorney General) v. Canada*, [1994] 2 SCR 41, 114 DLR (4th) 193.
[431] *Railway Act*, RSC 1985, c. R-3.

proceeds to answer this question by first citing ***Montreal Street R. Co. v. Normandin*** (1917), 33 D.L.R. 195, [1917] A.C. 170 (P.C.), and with that traditional citation I have no quarrel. I prefer, however, to place the greater emphasis on what has become of ***Normandin*** in Canadian case law.

In particular, I think it is relevant to note that in ***Reference re: Language Rights under the Manitoba Act***, 1870 (1985), 19 D.L.R. (4th) 1, [1985] 1 S.C.R. 721, [1985] 4 W.W.R. 385, this court commented upon the doctrinal basis of the ***Normandin*** distinction. The court stated (at p. 16):

> The doctrinal basis of the mandatory/directory distinction is difficult to ascertain. The "serious general inconvenience or injustice" of which Sir Arthur Channell speaks in ***Montreal Street R. Co. v. Normandin, supra***, appears to lie at the root of the distinction as it is applied by the courts.

In other words, courts tend to ask, simply: would it be seriously inconvenient to regard the performance of some statutory direction as an imperative?

There can be no doubt about the character of the present inquiry. The "mandatory" and "directory" labels themselves offer no magical assistance as one defines the nature of a statutory direction. Rather, the inquiry itself is blatantly result oriented. In ***Reference re: Manitoba Language Rights, supra***, this court cited ***R. ex rel. Anderson v. Buchanan*** (1909), 44 N.S.R. 112 (C.A.) at p. 130, per Russell J., to make the point. It is useful to make it again. Russell J. stated:

> I do not profess to be able to draw the distinction between what is directory and what is imperative, and I find that I am not alone in suspecting that, under the authorities, a provision may become directory if it is very desirable that compliance with it should not have been omitted, when that same provision would have been held to be imperative if the necessity had not arisen for the opposite ruling.
>
> The temptation is very great, where the consequences of holding a statute to be imperative are seriously inconvenient, to strain a point in favor of the contention that it is mere[ly] directory...

Thus, the manipulation of mandate and direction is, for the most part, the manipulation of an end and not a means. In this sense, to quote again from ***Reference re: Manitoba Language Rights, supra***, the principle is "vague and expedient" (p. 18). This means that the court which decides what is mandatory, and what is directory, brings no special tools to bear upon the decision. The decision is informed by the usual process of statutory interpretation. But the process perhaps evokes a special concern for "inconvenient" effects, both public and private, which will emanate from the interpretive result.

With these thoughts in mind, I acknowledge my agreement with much of what McLachlin J. has said. In particular, I agree with her that the language of s. 268(2), and especially its use of the word "shall", suggests an imperative reading. Indeed, in ***Reference re: Manitoba Language Rights, supra***, this court characterized the word shall as "presumptively imperative" in its ordinary grammatical meaning (p. 13). I also agree with McLachlin J. that the structure of the ***Railway Act*** demonstrates a

> concern for public input into termination decisions. Those concerns are real and pressing, and to ignore the value of public input in termination decisions would be to condone at least some level of inconvenience. But in my view, to the extent that I must make this alternative finding, I believe the approach of McLachlin J. focuses on the inconvenience of trammelling public input to the virtual exclusion of other kinds of inconvenience, both public and private.[432]

Apart from Justice Iacobucci's complaint regarding the "blatantly result oriented" process of determining whether a given provision is mandatory or directory, the critical part of his analysis seems to be that, although the word "shall" is presumptively imperative, the inquiry is primarily one of statutory interpretation, with "a special concern for 'inconvenient' effects, both public and private, which will emanate from the interpretive result." However, Iacobucci J was also careful to point out that a decision on whether a particular provision is mandatory or directory can work both public and private inconveniences, and that a court must ensure that it does not consider or over-emphasize one type of inconvenience to the exclusion or under-emphasis of another.

We now turn to the application of these principles to section 51 of the *Indian Act*.

Mandatory v. Directory in the Context of Section 51 of the Indian Act

There are no cases that specifically decide the issue of whether subsection 51(2) is mandatory or directory, but some authorities touch on it in *dicta*. In *Apsassin*, Addy J was asked at trial to decide whether a surrender meeting complied with the requirements of subsections 51(1) and (3). The question of eligibility under subsection (2) did not arise. However, the parties *did* contest whether the various subsections of section 51 were mandatory or merely directory, and on this point Addy J wrote:

> On the question of whether non-compliance with all of the provisions of s. 51(3) of the Act would invalidate the surrender, a legal issue arises as to whether those provisions are mandatory or merely directory. *In the latter case non-compliance would not render void the surrender itself nor its subsequent acceptance by the Governor in Council.*
>
> In considering this issue the actual wording of the other provisions of s. 51 are [sic] of some importance. Subsection 1 provides that "... no surrender ... shall be

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[432] *British Columbia (Attorney General) v. Canada*, [1994] 2 SCR 41, 114 DLR (4th) 193 at 256-57 (DLR), Iaccobucci J.

> valid or binding unless assented to ...". This is clearly a substantial or mandatory provision. ***Subsection 2 defines who is entitled to vote at a meeting*** and s-s. 4 provides that the Governor in Council may either accept or refuse the surrender. ***These provisions are also clearly substantial or mandatory.*** Subsection 3, however, provides the means by which the fact that the surrender has been properly taken and executed is to be evidenced or established.[433]

After reviewing the *Montreal Street Railway* case, Addy J remarked:

> As stated in the *Montreal Street Railway* case, the object of the statute must be considered. It seems clear that s. 51 has been enacted to ensure that the assent of the majority of adult members of the Band has been properly obtained before a surrender can be accepted by the Governor in Council and become valid and effective. The object of that section is to provide the means by which the general restrictions imposed on the surrender, sale or alienation of Indian reserve lands by s. 50 of the Act can be overcome. In other words, the sale or lease of Indian reserve lands must be made pursuant to the wishes on the Indian band and must, of course, also be approved by the Governor in Council. The last requirement would presumably involve the Governor in Council being satisfied that the surrender has been properly approved, that it is for the general welfare of the Indians and that they are not being unfairly deprived of their lands.
>
> Examination of the object of the statute reveals that a decision which would render the surrender null and void solely because of non-compliance with the formalities of s. 51(3) would certainly not promote the main object of the legislation where all substantial requirements have been fulfilled; it might well cause serious inconveniences or injustice to persons having no control over those entrusted with the duty of furnishing evidence of compliance in proper form. ***In the subsection, unlike s-s. (1), where it is provided that unless it is complied with no surrender shall be valid or binding, there is no provision for any consequences of non-observance.*** I therefore conclude that the provisions of s. 51(3) are merely directory and not mandatory.[434]

It is interesting to note this last reference to the lack of a "provision for any consequences of non-observance" in subsection (3). There is likewise no such provision in subsection (2), but Addy J nevertheless concluded in *dicta* that subsection (2) is "substantial or mandatory." Addy J previously concluded that non-compliance with a merely directory provision "would not render void the surrender,"[435] from which we infer that non-compliance with subsection (2), if mandatory, *would* render the surrender void *ab initio*. In the result, Addy J held that subsection 51(3) had been "sufficiently complied with" and that, in any event, its provisions were directory, not mandatory.[436]

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[433] *Apsassin v. Canada*, [1988] 1 CNLR 73 at 132-33 (FCTD). Emphasis added.
[434] *Apsassin v. Canada*, [1988] 1 CNLR 73 at 134 (FCTD). Emphasis added.
[435] *Apsassin v. Canada*, [1988] 1 CNLR 73 at 132 (FCTD).

Justice Addy's decision was subsequently appealed.[437] Although Stone JA of the Federal Court of Appeal disagreed with the conclusion that subsection 51(3) had been "sufficiently complied with," he agreed with Addy J that the subsection was merely directory and that non-compliance with it would not render the surrender void. He commenced by stating:

> There remains the question of whether this formality had to be complied with strictly in order for the surrender to be valid. The statute provides that the surrender "shall" be certified on oath. While the word "shall" in a statute is presumed to be imperative, a statute may itself contain some indication that a failure to comply with the duty which that word imposes will not nullify the action otherwise authorized. In such a case the provisions are viewed as merely directory. In the present case, it has been suggested that the provisions of section 51 are designed for the protection of the Indians and that "the Crown was duty bound to proceed according to that section": *Lower Kootenay Indian Band v. Canada* (1991), 42 F.T.R. 241 at 284, [1992] 2 C.N.L.R. 54 at 107 (F.C.T.D.).[438]

After quoting from the *Montreal Street Railway* case regarding the test for determining whether a statutory provision should be construed as mandatory or directory in nature, Stone JA continued:

> It is my view that this issue is to be decided in the statutory context. I agree with the Trial Judge that in the circumstances strict compliance with the particular formality in s. 51.3 was not essential to the validity of the surrender. The opening words of s. 51 provide that "no release or surrender ... shall be valid or binding" unless assented to by a majority of the male members of a band of the stipulated age at a meeting held in the presence of the Crown's representative. It thus appears that the main object of s. 51 was to ensure that no surrender could be effected without the prior assent of the concerned Indians. ***Section 51.2, respecting entitlement to vote, is related to it and must also be satisfied for an assent to be effective.*** Section 51.3 does not itself address the validity of the surrender, and appears to provide for a formality to be fulfilled subsequent to the assent and as a means of showing that the assent was duly given. Section 51.4, which provides for submission of the surrender documents to the Governor in Council for acceptance or refusal of the surrender "[w]hen such assent has been so certified," may suggest that no acceptance is possible unless the s. 51.3 certificate is among the surrender documents. As I have stated, the main object of s. 51 is set forth in its opening words which prohibits the surren-

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[436] *Apsassin v. Canada*, [1988] 1 CNLR 73 at 135 (FCTD).
[437] *Apsassin v. Canada*, [1993] 2 CNLR 20 (FCA).
[438] *Apsassin v. Canada*, [1993] 2 CNLR 20 at 47 (FCA), Stone JA.

> der of reserve lands unless the surrender is first assented to in the manner therein specified. I respectfully agree with the Trial Judge that the formality in question, although stated to be imperative, should be taken as directory. Other evidence established to the satisfaction of the Trial Judge that the required assent had been given at the surrender meeting in the presence of the Crown's representative. I therefore conclude that the Crown did not breach a fiduciary obligation by failing to observe the particular formality under the *Indian Act*.[439]

Isaac CJ in dissent did not deal with section 51 and Marceau JA, although concurring with Stone JA in the result, would have disposed of the arguments relating to section 51 on a different basis.

Ultimately, on appeal to the Supreme Court of Canada following the release of Justice Iacobucci's judgment in the *Vancouver Island Railway* case, McLachlin J concurred with the lower courts on this issue:

> This raises the question of whether the ss. 51(3) and 51(4) are mandatory or merely directory. Addy J. and Stone JA below held that despite the use of the word "shall", the provisions were directory rather than mandatory, relying on *Montreal Street Railway Co. v. Normandin*, [1917] A.C. 170 (P.C.).... Addy J. concluded that to read the provisions in a mandatory way would not promote the main object of the legislation, which is to ensure that the sale of the reserve is made pursuant to the wishes of the Band. Stone JA agreed. This Court has since held that the object of the statute, and the effect of ruling one way or the other, are the most important considerations in determining whether a directive is mandatory or directory: *British Columbia (Attorney General) v. Canada*, [1994] 2 S.C.R. 41.
>
> The true object of ss. 51(3) and 51(4) of the *Indian Act* was to ensure that the surrender was validly assented to by the Band. The evidence, including the voter's list, in the possession of the DIA [Department of Indian Affairs] amply established valid assent. Moreover, to read the provisions as mandatory would work serious inconvenience, not only where the surrender is later challenged, but in any case where the provision was not fulfilled, as the Band would have to go through the process again of holding a meeting, assenting to the surrender, and then certifying the assent. I therefore agree with the conclusion of the courts below that the "shall" in the provisions should not be considered mandatory. Failure to comply with s. 51 of the *Indian Act* therefore does not defeat the surrender.[440]

The predecessor to section 51 – section 49 of the 1906 *Indian Act* – was the subject of further judicial scrutiny in the *Chippewas of Kettle and Stony*

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[439] *Apsassin v. Canada*, [1993] 2 CNLR 20 at 48-49 (FCA), Stone JA. Emphasis added.

[440] *Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)*, [1995] 4 SCR 344 at 374-75, [1996] 2 CNLR 25, 130 DLR (4th) 193, McLachlin J.

Point case.[441] At trial, Killeen J rejected the "public law" argument that the Governor in Council had an independent and unreviewable discretion under subsection 49(4) to decide whether the conditions in subsections (1) to (3) had been satisfied.[442] He then turned to the interpretation of those three preceding subsections:

> What, then, is the effect of s. 49(1)-(3)?
>
> *Section 49(1) lays down, in my view, in explicit terms a true condition precedent to the validity of any surrender and sale of Indian reserve lands. It makes this abundantly clear by saying that no such surrender "shall be valid or binding" unless its directions are followed.*
>
> Bearing in mind the prophylactic principle at stake in the Royal Proclamation, as reinforced by s. 48-50, *it is simply impossible to argue that s. 49(1) does not lay down a mandatory precondition for the validity of any surrender. If the surrender in question has not followed the s. 49(1) procedure, it must be void ab initio. To suggest otherwise is to rewrite history and the commands of the Royal Proclamation and the Indian Act.*
>
> Section 49(1) may be summarized in this way. It states that no surrender is valid or binding unless
>
> (1) it was "assented to" by a majority of male members over 21 years;
> (2) the assent must have been given at a "meeting or council" called for that purpose;
> (3) the meeting or council must have been called "according to the rules of the Band";
> (4) the meeting or council must have been conducted "in the presence of" the Superintendent General or his agent – in practice, an Indian agent.[443]

Before turning to subsection (2), Killeen J dealt with the band's argument that seven of 27 individuals who voted in favour of the surrender in that case – including one, Maurice George, who did not even attend the surrender meeting and was later induced by the prospective purchaser, A. MacKenzie Crawford, and Indian Agent Thomas Paul to vote for the surrender – "had no status as Band members to vote." Had Killeen J not concluded that these seven individuals – all members of the George family – were in fact entitled to vote, the *Chippewas of Kettle and Stony Point* case might have been a binding precedent on the Commission in this inquiry. However, he did in fact find that all seven were eligible, and in his opinion there was no chance "that the Band will be able to uncover future credible evidence impeaching the status of the Georges as voting members."[444] Nevertheless, and perhaps surprisingly in light of his comments regarding the mandatory nature of subsection (1), he stated with regard to Maurice George's unconventional participation in the vote:

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[441] *Chippewas of Kettle and Stony Point v. Canada (Attorney General)*, [1996] 1 CNLR 54 at 85 (Ont. Ct (Gen. Div.)).

[442] *Chippewas of Kettle and Stony Point v. Canada (Attorney General)*, [1996] 1 CNLR 54 at 82 (Ont. Ct (Gen. Div.)).

[443] *Chippewas of Kettle and Stony Point v. Canada (Attorney General)*, [1996] 1 CNLR 54 at 82-83 (Ont. Ct (Gen. Div.)).

> It is true that Maurice George's vote was defective in that he did not attend the meeting, but his non-attendance cannot invalidate the vote. There is nothing in s. 49 or elsewhere [in the] Act supporting such an argument and common sense is against it. The 26 [of 44 eligible voting members] who did vote favourably clearly constituted a strong majority.[445]

While we agree that there was nothing in section 49 of the 1906 *Indian Act* or section 51 of the 1927 statute to compel an eligible voting member to attend and vote at a surrender meeting, we do not read those sections as permitting members to vote *other than* at a surrender meeting specifically called for the purpose of dealing with the surrender. As we have already noted, we are not called upon to address that issue in this inquiry since, despite Deputy Superintendent General Scott's authorizing memorandum, there is no evidence to suggest that the surrender was considered in meetings with small groups or individual members of the Duncan's Band. However, what we find interesting is that Killeen J was prepared to consider Maurice George's vote as merely "defective" but not as placing the validity of the surrender in doubt.

With regard to subsection (2), Killeen J was primarily concerned with Crawford's attendance at the surrender meeting to offer cash inducements to the voting members to encourage them to vote in favour of the surrender. Killeen J held:

> Section 49(2) provides that no Indian shall vote or be present at the council meeting unless he habitually resides at or near the reserve and is interested in the reserve. I have already ruled that those who voted at the General Council meeting were entitled to vote as legitimate members of the Band....
>
> However, Mr. Vogel [counsel for the Band] takes another tack in attempting to argue that s. 49(2) has been violated. His argument is that s. 49(2), by necessary

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[444] *Chippewas of Kettle and Stony Point v. Canada (Attorney General)*, [1996] 1 CNLR 54 at 86 (Ont. Ct (Gen. Div.)).

[445] *Chippewas of Kettle and Stony Point v. Canada (Attorney General)*, [1996] 1 CNLR 54 at 87 (Ont. Ct (Gen. Div.)).

> implication, prohibits anyone other than the Indian agent and qualified voters from being in attendance at the General Council meeting. His point, here, really goes back for attempted reinforcement to the Royal Proclamation and the broad context of the Act itself. He submits that the Royal Proclamation contains a general prohibition against "direct dealing", as he put it, between a prospective purchaser and an Indian Band. Thus, s. 49(2) should be read broadly to prohibit a purchaser such as Crawford from having any dealings of a direct nature, including attending at the General Council meeting or offering the $15.00 cash payments to the voting members.
>
> As to the undoubted attendance of Crawford at the General Council meeting, I can find no support in the Royal Proclamation or s. 49(2) for an express or implied prohibition against that.
>
> The Royal Proclamation does not prohibit direct dealings per se. What it does is prohibit direct sales and interposes the presence of the Crown through the surrender procedure in an attempt to protect the Indians from the sharp and predatory practices of the past.
>
> It would have been easy for Parliament, if so-minded, to prohibit all direct dealings and, within s. 49(2), to prohibit the attendance of outsiders, including a prospective purchaser, at a surrender meeting. It chose not to do so and I find no warrant anywhere in the Royal Proclamation or the Act for virtually re-writing s. 49(2) such that it could be interpreted to prohibit direct dealing or attendance at the surrender meeting.
>
> Equally, I cannot conclude that the promises of the $15.00 direct cash payments and the distribution of $5.00 to each of the voters at the March 30 meeting violated s. 49(2) or any other provision of the Act.
>
> There can be little doubt that these cash payments, and the promises which preceded them, have an odour of moral failure about them. It is, perhaps, hard to understand why the Departmental officials could countenance such side offers even in the different world of the 1920s in which they were working. However, as I have said above, I cannot read a prohibition against them within the statutory code of the Act.
>
> *I may also say, here, that I am not persuaded that s. 49(2) contains a mandatory procedural requirement of the kind specified in s. 49(1). There is nothing in s. 49(2) itself to suggest that failure to comply with its directive would render the surrender invalid.* In any event, I am entirely satisfied that s. 49(2) was complied with and that no one who voted at the meeting violated its prescription.[446]

On the appeal of Justice Killeen's decision,[447] Laskin JA on behalf of a unanimous Ontario Court of Appeal, after setting out the provisions of the *Royal Proclamation* and section 49 of the 1906 *Indian Act*, stated:

> The underlying rationale for the Royal Proclamation and for these provisions of the *Indian Act* was to prevent aboriginal peoples from being exploited: *Guerin v. R.*,

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[446] *Chippewas of Kettle and Stony Point v. Canada (Attorney General)*, [1996] 1 CNLR 54 at 88 (Ont. Ct (Gen. Div.)). Emphasis added.

[447] *Chippewas of Kettle and Stony Point v. Canada (Attorney General)* (1996), 31 OR (3d) 97 (Ont CA).

> [1984] 2 S.C.R. 335, 13 D.L.R. (4th) 321. The Royal Proclamation and the statute protected the aboriginals' interest in their reserve land and at the same time permitted them to make their own decisions about the land. As Killeen J. noted at p. 683, the Crown "assumed a protective and fiduciary role"; it became a buffer or an intermediary between aboriginal peoples and third party purchasers of aboriginal land. If the meeting was public with dealings conducted in the open, frauds, abuses and misunderstandings were less likely to occur.
>
> The Band argues that "it is a reasonable and necessary interpretation" of s. 49 that only the Indian agent (appointed by the Department of Indian Affairs) and qualified voters are entitled to attend a Band meeting that considers a surrender. In this case, Crawford, one of the purchasers, attended the meeting of the General Council of the Band on March 30, 1927, which was called to consider his proposed surrender of the Kettle Point land. While there, Crawford was permitted by the Indian agent to pay $5 cash to each voting member in attendance. The Band submits that s. 49 precluded Crawford from attending and from negotiating directly with the Band.[448]

After quoting Killeen J regarding the absence of language in the legislation to prohibit the attendance of outsiders, including prospective purchasers, at surrender meetings, Laskin JA continued:

> A case could arise in which direct dealings between an Indian Band and a prospective purchaser would violate the spirit, if not the express words, of the Royal Proclamation or s. 49 of the *Indian Act*. I do, however, agree with Killeen J. that in this case the mere presence of Crawford at the meeting violated neither the language nor the rationale of the Royal Proclamation or the Act. I would therefore not give effect to the Band's first ground of appeal. The Band's real complaint is not that Crawford attended the meeting, but that he exploited the members by offering them a "bribe" to vote for the surrender.[449]

This decision was ultimately upheld without additional reasons on appeal to the Supreme Court of Canada.[450]

It is on the basis of these reasons that Canada argues that the presence of someone other than an eligible voter and the Crown's representative at a surrender meeting will not taint or invalidate the surrender.[451] In the Commission's view, however, the only decision made with regard to subsection 49(2) in *Chippewas of Kettle and Stony Point* is that it did not apply on the facts of that case. The prohibition in subsection (2) was aimed at *Indians*, but there is nothing to suggest that the prospective purchaser, Crawford, was aboriginal. Therefore, according to Killeen J and the Ontario Court of Appeal, his presence at the meeting was not prohibited even though, by definition, he could not be interested in the reserve in the manner contemplated by the Act. The case does *not* support the proposition that an Indian who is not habitually resident on or near, and interested in the reserve can attend and vote at a surrender meeting, and that subsection (2) is therefore merely directory.

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[448] *Chippewas of Kettle and Stony Point v. Canada (Attorney General)* (1996), 31 OR (3d) 97 at 101 (Ont CA)

[449] *Chippewas of Kettle and Stony Point v. Canada (Attorney General)* (1996), 31 OR (3d) 97 at 102 (Ont CA).

[450] *Chippewas of Kettle and Stony Point v. Canada (Attorney General)*, [1998] 1 SCR 756.

[451] ICC Transcript, November 26, 1997, p. 168 (Perry Robinson).

We have already noted Justice Killeen's conclusion that "[t]here is nothing in s. 49(2) itself to suggest that failure to comply with its directive would render the surrender invalid." However, Killeen J later shed additional light on subsection (2) in his discussion of subsection (3):

> I cannot agree with Mr. Vogel's contention that s. 49(3) contains a mandatory precondition to the validity of the surrender.
>
> It is true that s. 49(3) uses the phrase "shall be certified" but, considered in context, I believe this language to be directory and not mandatory.
>
> In order to get at the meaning and scope of this phrase, *one must consider the object and purpose of s. 49(3). As it seems to me, its purpose is clearly differentiated from the purpose of s. 49(1) or (2). These latter provisions establish the exact procedures to be followed in effectuating a valid surrender on the part of a given Indian band. On the other hand, s. 49(3) achieves what I would call an after-the-fact evidentiary purpose, namely, to provide sworn documentary proof that the requirements of s. 49(1)-(2) have been complied with in all respects.*
>
> I cannot believe that an evidentiary or proof proviso aimed at providing future proof in sworn form that appropriate procedures for an assent to surrender have been followed can somehow have a nullifying effect on an assent to surrender that would otherwise be valid. Section 49(3) itself does not use the same language as s. 49(1) does – "no release or surrender of a reserve ... shall be valid or binding, unless ..." – and, absent such language, the context and purpose of s. 49(3) dictates that it be given a directory rather than mandatory effect.
>
> I note here that, on my view of the evidence in this case, there is overwhelming proof that the Band gave its assent to the surrender with a strong overall majority vote of at least 26 out of 44 eligible voters, and it would be ludicrous, I think, to hold that established assent to be invalid because an after-the-fact proof requirement is defective. It may be added, also, that the statutory declaration is only partially defective because the statutory declaration is valid so far as it relates to the joint oaths of the three Indian representatives who were, after all, present at the vote and who have pledged their oaths that the procedures of s. 49(1)-(2) were followed.
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> I am comforted in this conclusion by the decision of the Federal Court of Appeal in *Apsassin*....[452]

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[452] *Chippewas of Kettle and Stony Point v. Canada (Attorney General)*, [1996] 1 CNLR 54 at 89-90 (Ont. Ct (Gen. Div.)).

It will be recalled that Stone JA in *Apsassin* concluded that subsection (3) was merely directory, but that subsection (1) and – in *dicta* – subsection (2) were both mandatory. Justice Killeen's comments are therefore confusing. On one hand, he says he is "not persuaded that s. 49(2) contains a mandatory procedural requirement of the kind specified in s. 49(1)," and he notes that, unlike subsection (1), subsection (3) does not contain the sort of language and purpose that require it to be given a directory rather than mandatory effect. Like subsection (3), subsection (2) does not contain wording like "no release or surrender of a reserve ... shall be valid or binding, unless ..." that is found only in subsection (1).

On the other hand, Killeen J differentiates the purposes of subsections (2) and (3), the former being part of what is required to "establish the exact procedures to be followed in effectuating a valid surrender on the part of a given Indian band," and the latter to achieve "an after-the-fact evidentiary purpose, namely, to provide sworn documentary proof that the requirements of s. 49(1)-(2) have been complied with in all respects." Since Stone JA in *Apsassin* viewed subsections (1) and (2) as being "related," with both subsections needing to be fully satisfied for a surrender to be valid, and Addy J also concluded that subsection (2) is "substantial or mandatory," it is perplexing that Killeen J purported to find support in *Apsassin* while concurrently being unpersuaded that subsection (2) was the same sort of mandatory provision as subsection (1).

In this curious – and entirely *obiter* – jurisprudential context, it now falls to the Commission to decide whether subsection (2) is mandatory or merely directory. If it is mandatory and any of its terms have not been met, then, as we have noted, the surrender must be considered void *ab initio*. If it is merely directory, the failure to satisfy its terms can be treated as a technical defect that, while possibly leaving Canada open to some form of sanction, will not affect the validity of the surrender.

McLachlin J in *Apsassin* distilled the relevant principles from the *Montreal Street Railway* and *Vancouver Island Railway* cases into a test that requires us to determine whether a mandatory interpretation of subsection 51(2) of the 1927 *Indian Act* will result in serious general inconvenience, or injustice to persons who have no control over those entrusted with the statutory duty, and at the same time does not promote Parliament's main or "true" object in enacting the legislation. The most important considerations in applying this test are the object of the statute and "the effect of ruling one way or the other."

As to the object of section 51, it will be recalled that Addy J stated:

> It seems clear that s. 51 has been enacted to ensure that the assent of the majority of adult members of the Band has been properly obtained before a surrender can be accepted by the Governor in Council and become valid and effective. The object of that section is to provide the means by which the general restrictions imposed on the surrender, sale or alienation of Indian reserve lands by s. 50 of the Act can be overcome.[453]

Similarly, Stone JA considered that the object of the legislation was "to ensure that no surrender could be effected without the prior assent of the concerned Indians,"[454] and McLachlin J characterized it as ensuring "that the sale of the reserve is made pursuant to the wishes of the Band."[455] In short, while an underlying theme of the *Indian Act* may be to protect Indians from exploitation and the erosion of their land base, section 51 of the 1927 statute and like provisions preceding and following it were enacted to permit an Indian band to dispose of its reserve lands provided that Canada and the band both consented.

That being said, it is understandable why all three courts in *Apsassin* would have concluded that the provision at play in that case was directory rather than mandatory. Subsection (3) is much more ancillary to the purpose of section 51 than subsections (1) and (2). As Killeen J stated in *Chippewas of Kettle and Stony Point*, the purpose of subsections (1) and (2) is to set forth the procedure by which a surrender is to take place, whereas subsection (3) merely confirms that the surrender was validly assented to by the Band.[456]

Valid band assent to a surrender is clearly a "mandatory" requirement or condition precedent to a valid surrender of reserve land. The substance of the Commission's inquiry, therefore, must be to determine whether there has been a fair vote conducted that accurately reflects whether the consent of the community has been given. To read section 51 otherwise would completely nullify the underlying purpose of the surrender provisions. In short, under that provision a surrender would be void *ab initio* if it did not receive majority assent of the adult male members of the band at a meeting or council summoned according to the rules of the band for the purpose of considering the surrender and held in the presence of the Superintendent General or his duly authorized representative. We find that such assent *was* given.

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[453] *Apsassin v. Canada*, [1988] 1 CNLR 73 at 134 (FCTD).

[454] *Apsassin v. Canada*, [1993] 2 CNLR 20 at 49 (FCA), Stone JA.

[455] *Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)*, [1995]4 SCR 344 at 374, [1996] 2 CNLR 25, 130 DLR (4th) 193, McLachlin J.

[456] *Chippewas of Kettle and Stony Point v. Canada (Attorney General)*, [1996] 1 CNLR 54 at 89 (Ont. Ct (Gen. Div.)).

McLachlin J also said that not only is the *object* of the statutory provision to be considered, but also the *effect of ruling one way or the other*. Where treating a provision as mandatory will result in serious general inconvenience, or injustice to persons who have no control over those entrusted with the statutory duty, and at the same time does not promote Parliament's main or "true" object in enacting the legislation, then the provision should be treated as directory. In considering whether a serious inconvenience would arise, we must also recall Justice Iacobucci's admonition in the *Vancouver Island Railway* case to consider all possible inconveniences, whether public or private, without considering or over-emphasizing one type of inconvenience to the exclusion or under-emphasis of another.

McLachlin J in *Apsassin* alluded to the sorts of inconvenience that can arise where it is alleged that a statutory provision regarding surrender has not been met:

> ... to read the provisions as mandatory would work serious inconvenience, not only where the surrender is later challenged, but in any case where the provision was not fulfilled, as the Band would have to go through the process again of holding a meeting, assenting to the surrender, and then certifying the assent. I therefore agree with the conclusion of the courts below that the "shall" in the provisions should not be considered mandatory. Failure to comply with s. 51 of the *Indian Act* therefore does not defeat the surrender.[457]

There may also be serious inconvenience to those individuals who acquired the lands following the surrender and now own them in fee simple. On the other hand, a serious inconvenience may have been worked to the Duncan's First Nation if in fact the surrender was imposed by representatives of the federal government contrary to the Band's wishes. Obviously, if true band assent was not obtained, the object of the surrender provisions of the *Indian Act* would be frustrated and rendered meaningless.

In the context of these competing considerations, the Commission takes the view that the terms of subsection 51(2) prohibiting Indians from attending or voting at a surrender meeting unless they habitually reside on or near, and are interested in the reserve should not be considered mandatory in nature. In the absence of evidence demonstrating that the inadvertent presence or vote of one or more ineligible Indians has cast a band's majority assent into doubt, we believe that the meeting and vote should be treated as valid. Furthermore, we believe that, if a surrender was to be rendered void by the presence of one ineligible voter in the face of a strong majority in favour of the surrender, that would result in a serious inconvenience. Therefore, provided that the quorum and majority assent requirements of a surrender meeting have still been met after discounting the ineligible votes, and further provided that the attendance of ineligible Indians at the surrender meeting has not been demonstrated to have irretrievably undermined or discredited the meeting, the surrender should be allowed to stand.

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[457] *Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)*, [1995]4 SCR 344 at 374-75, [1996] 2 CNLR 25, 130 DLR (4th) 193, McLachlin J.

In the present case, the Duncan's 1928 surrender meeting appears to have been attended by at least one ineligible Indian, Emile Leg, and perhaps more if members of the Beaver Band were also present. Leg also voted in favour of the surrender. Nevertheless, there is no evidence before us that would suggest that the surrender proceedings were compromised by the presence or participation of one or more of these individuals. Accordingly, if the First Nation's challenge of this surrender is to be upheld, it must be on the basis of whether the disqualification of ineligible voters raises doubts that the quorum and majority assent requirements of subsection (1) were satisfied. It is to those questions that we now turn.

Was There a Quorum?

A quorum is the number of band members who must be present at a surrender meeting before it can be said that the meeting is properly constituted and the band can transact business. The First Nation's initial position is that none of the Duncan's Band members lived near the reserves in question, meaning that it would not have been possible to convene a surrender meeting at all.[458] Alternatively, if IR 151A might be considered "near" the reserves to be surrendered, then the only two band members who would have been eligible to vote were Samuel and Eban Testawits; since only Eban attended the meeting, the majority of eligible voters required to establish quorum was not met and the meeting was still not properly convened.[459] Finally, in the further alternative, assuming that Alex Mooswah was eligible to vote at the surrender meeting, the First Nation argues that the total number of members who were eligible to vote was eight, resulting in a quorum requirement of five, which, in counsel's submission, was not met if any one of the five who attended was not eligible to do so.[460] As we have already seen, the First Nation submits that, at the very least, Emile Leg was ineligible, and that others may have been as well.

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[458] Written Submission on Behalf of the Duncan's First Nation, November 12, 1997, p. 53.
[459] ICC Transcript, November 26, 1997, p. 164 (Perry Robinson).

In reply, Canada argues that there were seven eligible voters,[461] and that, since five of those seven attended the surrender meeting and voted, quorum was achieved.[462] Alternatively, even if Alex Mooswah was at least 21 years old in 1928 and otherwise eligible to vote, five of eight still constituted a majority of eligible voters and thus a quorum.[463]

The quorum requirements of section 49 of the 1906 *Indian Act* – virtually identical to those of section 51 of the 1927 statute – were considered by the Supreme Court of Canada in *Cardinal v. R.*[464] In that case, 26 of the 30 to 33 male members of the Enoch Band of the full age of 21 years attended the surrender meeting, with 14 voting in favour of the surrender and 12 opposed. To use the terminology employed by J. Paul Salembier in a recent article, the surrender was approved by only a "relative majority" of those in attendance at the meeting and not by an "absolute majority" of all 30 to 33 eligible members of the Band.[465] For the Court, Estey J held that a majority of the male members *eligible to vote* must be present to establish quorum at a meeting called for the purpose of voting on surrender. Significantly, he also concluded that, in determining that majority, those members rendered ineligible by subsection (2) are *not* to be counted in establishing the potential voting population:

> Some help can be gained from a reference to subs. (2), which for convenience I repeat here:
>
> > 2. No Indian shall be entitled to vote or be present at such council, unless he habitually resides on or near, and is interested in the reserve in question.
>
> ***The effect of this subsection is to remove from the list of members otherwise eligible to assent to a surrender those Indians who do not habitually reside on or near the reserve.*** Nevertheless, such a member remains a member of the band, because only by the procedure set out in s. 13 of the Act shall an Indian "cease to be a member of the band". It is to be assumed that the "majority" referred to in subs.

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[460] ICC Transcript, November 25, 1997, p. 61 (Jerome Slavik).

[461] ICC Transcript, November 26, 1997, p. 164 (Perry Robinson).

[462] Written Submission on Behalf of the Government of Canada, November 17, 1997, p. 20.

[463] Written Submission on Behalf of the Government of Canada, November 17, 1997, pp. 21-22.

[464] *Cardinal v. R.*, [1982] 1 SCR 508, 13 DLR (4th) 321, [1982] 3 CNLR 3.

[465] J. Paul Salembier, "How Many Sheep Make a Flock? An Analysis of the Surrender Provisions of the *Indian Act*," [1992] 1 CNLR 14 at 16.

> (1) means a majority of those members who remain eligible to vote after giving effect to the restriction in subs. (2). If such is not the case, then a member who does not vote for any reason, including non-compliance with subs. (2), would be given a negative vote for the purposes of determining whether a majority vote had been obtained under subs. (1). However, subs. (1) taken by itself is worded very broadly, and refers only to "a majority of the male members of the band of the full age of twenty-one years". That certainly would include members of the band who do not reside on or near the reserve. If the minority in the Court of Appeal is correct, then the absentee member, disentitled to vote under s. 49(2) but still a member, as he has not been removed under s. 13, is given a negative vote, in the sense that he is included in the absolute number of male members of the band the majority of whom must assent to the proposed surrender."[466]

Cardinal was later considered and adopted by Jerome ACJ of the Federal Court, Trial Division, in *King v. The Queen*.[467] In that case, the Chief of a band that had surrendered reserve land sought a declaration that the surrender vote was valid because a majority of the electors of the band had assented to it as required by section 39 of the 1970 *Indian Act*. That statute, worded differently from the 1906 and 1927 versions, provided that "[a] surrender is void unless ... it is assented to by a majority of the electors of the band" at a meeting or by referendum. The surrender had been put to a vote in a referendum in which 190 of 378 eligible voters cast ballots, with 172 votes in favour, 15 opposed, and three spoiled ballots. After quoting Estey J extensively, Jerome ACJ held that, "[b]ased on the reasoning in *Cardinal* and the language of s. 39(1)(b) the requirements of that paragraph are met where a majority of those electors of the band who completed a ballot in the referendum, assented to the surrender."[468] Acceptance of the fact that the 190 voters casting ballots would constitute a quorum is implicit in this conclusion.

Applying this reasoning to the circumstances of the Duncan's Band, it will be recalled that we have already determined that Emile and Francis Leg were not eligible to participate in the surrender proceedings. We find that, of the six remaining male members of the Band of the full age of 21 years, four – Joseph Testawits, Eban Testawits, John Boucher and James Boucher – participated in the surrender vote. We conclude that these four constituted a majority of the six eligible voters and therefore the surrender meeting achieved the required quorum.

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[466] *Cardinal v. R.*, [1982] 1 SCR 508, 13 DLR (4th) 321, [1982] 3 CNLR 3 at 8. Emphasis added.
[467] *King v. The Queen*, [1986] 4 CNLR 74 (FCTD).
[468] *King v. The Queen*, [1986] 4 CNLR 74 at 78 (FCTD).

Did the Surrender Receive the Required Majority Assent?

In *Cardinal*, Estey J held that, while the words "a majority of the male members of the band" in subsection 49(1) of the 1906 ***Indian Act*** represent the ***quorum*** requirement of the meeting, the common law supplies the ***assent*** requirement. In other words, at common law, assuming that the quorum requirement has been fulfilled, a majority of the votes cast at the meeting – a "relative majority" rather than an "absolute majority" – decides whether assent will be given to the proposed surrender. Estey J stated:

> There remains to determine only the requirement for the expression of assent, in the sense of that term in s. 49(1), at the meeting attended by the prescribed majority. In the common law and, indeed, in general usage of the language, a group of persons may, unless specially organized, express their view only by an agreement by the majority. A refinement arises where all members of a defined group present at a meeting do not express a view. In that case, as we shall see, the common law expresses again the ordinary sense of our language that the group viewpoint is that which is expressed by the majority of those declaring or voting on the issue in question. Thus, by this rather simple line of reasoning, the section is construed as meaning that an assent, to be valid, must be given by a majority of a majority of eligible band members in attendance at a meeting called for the purpose of giving or withholding assent....
>
> To require otherwise, that is to say, more than a mere majority of the prescribed quorum of eligible band members present to assent to the proposition, would put an undue power in the hands of those members who, while eligible, do not trouble themselves to attend or, if in attendance, to vote; or, as it was put by Gillanders JA in *Glass Bottle Blowers*,[469] supra, at p. 656, it would "give undue effect to the indifference of a small minority."[470]

Counsel for the First Nation suggests that Estey J was wrong, and that only an absolute majority can assent to a surrender:

> [Y]ou figure out how many people are really over the age of 21 and you must have a majority of them, and if certain people can't vote, they can't vote. You still need a majority of people over 21 after removing the ineligible voters. So if you have ten in a band and you have two ineligible voters, you still need a majority of six. I think that [subsection] 51(1) – and here is where I disagree with Justice Estey – isn't just a majority of the eligible voters. It means what it says. It's a majority of male members over the age of 21.[471]

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[469] *Glass Bottle Blowers' Association of the United States and Canada v. Dominion Glass Co. Ltd.*, [1943] OWN 652 (Lab. Ct).

[470] *Cardinal v. R.*, [1982] 1 SCR 508, 13 DLR (4th) 321, [1982] 3 CNLR 3 at 9-10 (SCC).

[471] ICC Transcript, November 26, 1997, p. 215 (Jerome Slavik).

Arguing that Justice Estey's comments regarding majority assent were *obiter* and thus not binding, counsel further submits that his own approach should be preferred notwithstanding that, in some circumstances, it might become mathematically impossible to achieve a majority vote in favour of a surrender.[472]

Canada's view is that, while Estey J may have discussed the question of majority assent in *obiter*, his analysis is nonetheless compelling and should be followed. In other words, once quorum is achieved, assent must be given by a majority of those voting at the surrender meeting who remain eligible after disqualifying those rendered ineligible by subsection (2).[473] This means that, in the present case, given that four eligible members attended the surrender meeting, three of those four had to vote in favour of the surrender for a valid assent. In fact, Canada contends that the Band did better than that by having all of the eligible voters in attendance vote for the surrender.[474]

We have already established that, with the exception of Emile and Francis Leg, the remaining five individuals on Murison's 1928 voters' list were all habitually resident on or near, and interested in the reserves being surrendered, as was Alex Mooswah. Therefore, to obtain a valid surrender, four of six eligible voters were required to attend the meeting to achieve quorum; three of those four were required to vote in favour of the surrender for the required majority assent. Since all four eligible voters who attended the meeting in fact voted for the surrender, the majority assent requirement was met.

Did Canada Accept the Surrender?

Subsection 51(4) of the 1927 *Indian Act* stipulates that, once a band's assent to a surrender has been certified on oath by the Crown's officer and by some of the band's chiefs and principal men, it is to be submitted to the Governor in Council for acceptance or refusal. Of this having been done there is little doubt since, as we have seen, Order in Council PC 82 dated January 19, 1929, confirmed the Governor in Council's acceptance of the surrender of IR 151 and IR 151B to 151G by the Duncan's Band.[475]

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[472] ICC Transcript, November 26, 1997, pp. 235-36 (Jerome Slavik).

[473] ICC Transcript, November 26, 1997, p. 236 (Perry Robinson).

[474] ICC Transcript, November 26, 1997, pp. 165-67 (Perry Robinson).

[475] Superintendent General of Indian Affairs to Governor General in Council, January 7, 1929, NA, RG 10, vol. 7544, file 29131-5, vol. 1 (ICC Documents, pp. 285-86); Order in Council PC 82, January 19, 1929, file B-8260-145/A1-3 (ICC Documents, pp. 288-89).

Counsel for the First Nation contends that, although Canada's acceptance may have been technically sound, it was inappropriate for Canada to have accepted the surrender when it knew, first, that the requirements of the Act had not been met and, second, that the surrender documents were inadequate, "having been prepared in suspicious circumstances and with a motive to fabricate" to procure the surrender.[476] At this point, however, the Commission is prepared simply to conclude that Canada accepted the surrender in accordance with the strict technical requirements of subsection 51(4). We will address the First Nation's concerns in the context of our analysis of whether, with regard to this surrender, Canada breached the fiduciary obligations superimposed by the courts on subsection (4) or violated any other fiduciary obligations to the First Nation.

Conclusion

The Commission has determined that, following appropriate notice being given, five adult male members of the Duncan's Band – Joseph Testawits, Eban Testawits, John Boucher, James Boucher, and Emile Leg, the first four of whom habitually resided on or near and were interested in the Band's reserves – convened on IR 152 on September 19, 1928, for the express purpose of deciding whether to surrender IR 151 and IR 151B to 151G. In attendance were Inspector of Indian Agencies William Murison and Indian Agent Harold Laird, who were authorized to represent the Crown at the meeting. The four eligible Indian participants, constituting a quorum of the Band's eligible voting members, unanimously assented to the surrender, with three – Joseph Testawits, Eban Testawits, and James Boucher – making their way to Waterhole, Alberta, later that day. There, along with Murison, they appeared before lawyer William P. Dundas, who notarized their affidavit deposing that the surrender had been duly approved by the Band. The surrender was subsequently forwarded to the Governor in Council, who accepted it by Order in Council dated January 19, 1929. It is based on these facts that the Commission concludes that the 1928 surrender by the Duncan's Band complied in all material respects with section 51 of the 1927 *Indian Act*.

In previous inquiries, the Commission has had occasion to discuss the effect of finding that a surrender has satisfied the statutory requirements of the *Indian Act*. For example, in our report dealing with the 1907 surrender by the Kahkewistahaw First Nation, we wrote:

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[476] Written Submission on Behalf of the Duncan's First Nation, November 12, 1997, p. 69

> Extinguishing the aboriginal interest in the surrendered land means that it is not open to the Kahkewistahaw Band to challenge the titles of the current registered owners of the surrendered lands, most, if not all, of whom by this late date must be *bona fide* third party purchasers for value. It must be kept in mind, however, that the appeal in *Chippewas of Kettle and Stony Point* arose from a motion by the Crown seeking summary judgment dismissing the Band's claim for a declaration that the 1927 surrender and the 1929 Crown patent in that case were void. Although the decision confirmed the surrender as well as the titles of those defendants who now own land surrendered by the Band in 1927, Killeen J also recognized that certain issues could not be disposed of summarily and remained to be decided at trial:
>
>> Any finding of unconscionable conduct under the facts of this case *cannot affect the validity of the Order in Council* [approving the surrender]; *rather, such finding or findings must surely go to the Band's other claim for breach of fiduciary duty.*[477]
>
> Similarly, the Court of Appeal concluded:
>
>> ... what then of the cash payments, which, in the words of the motions judge, had "an odour of moral failure about them"? In my view, there is no evidence to suggest that these cash payments, in the words of McLachlin J., vitiated the "true intent" or the "free and informed consent" of the Band or, in the words of Gonthier J., "made it unsafe to rely on the Band's understanding and intention." In keeping with Apsassin, the decision of the Band to sell should be honoured. Therefore, like Killeen J., I am satisfied that there is no genuine issue for trial on whether the cash payments invalidated the surrender. I would dismiss the Band's second ground of appeal.
>>
>> *I add, however, that the cash payments or alleged "bribe" and consequent exploitation or "tainted dealings" may afford grounds for the Band to make out a case of breach of fiduciary duty against the Crown. As the parties have recognized, this is an issue for trial. The same may be said of the Band's contention that the sale to Crawford was improvident, he having immediately "flipped" the land for nearly three times the purchase price.* In discussing whether the Crown had a fiduciary duty to prevent the surrender in Apsassin, McLachlin J. wrote at p. 371:
>>
>>> It follows that under the Indian Act, the Band had the right to decide whether to surrender the reserve, and its decision was to be respected. At the same time, if the Band's decision was foolish or improvident – a decision that constituted exploitation – the Crown could refuse to con-

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[477] *Chippewas of Kettle and Stony Point v. Attorney General of Canada* (1995), 24 OR (3d) 654 at 698 (Ont. Ct (Gen. Div.)).

> sent. In short, the Crown's obligation was limited to preventing exploitative bargains.
>
> This, too, is an issue for trial.[478]

Our mandate under the Specific Claims Policy is to determine whether an outstanding lawful obligation is owed by Canada to the Duncan's First Nation. Although we have concluded that the surrender was technically valid, an outstanding lawful obligation may nevertheless be grounded in Canada's breach of its fiduciary duties to the First Nation. We now turn to our analysis of the fiduciary duties, if any, owed by Canada to the Duncan's First Nation on the facts of this case.

ISSUES 2 AND 3 CANADA'S PRE-SURRENDER FIDUCIARY OBLIGATIONS

Did the Crown meet its pre-surrender fiduciary obligations?

Was the decision of the Indians tainted by the conduct of the Crown in the pre-surrender proceedings?

In the course of its inquiries into the claims of the Kahkewistahaw, Moosomin, and Chippewas of Kettle and Stony Point First Nations and the Sumas Indian Band,[479] the Commission has already had several opportunities to canvass at some length the leading authorities dealing with the Crown's fiduciary duties to First Nations – most notably *Guerin v. The Queen*[480] and *Apsassin*. Having done so, we now find it convenient to deal jointly with the second and third issues in this inquiry, since both require the Commission to consider the Crown's pre-surrender fiduciary obligations to the Duncan's Band.

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[478] Indian Claims Commission, *Inquiry into the 1907 Reserve Land Surrender Claim of the Kahkewistahaw First Nation* (Ottawa, February 1997), reported (1998) 8 ICCP 3 at 73, quoting *Chippewas of Kettle and Stony Point v. Canada (Attorney General)*, unreported, [1996] OJ No. 4188 (December 2, 1996) at 24-25 (Ont CA). Emphasis added. The references to "improvidence" in this passage relate to the issue of the Crown's fiduciary obligations arising out of the Governor in Council's acceptance of a surrender under subsection 49(4). This issue will be dealt with later in this report.

[479] Indian Claims Commission, *Inquiry into the 1907 Reserve Land Surrender Claim of the Kahkewistahaw First Nation* (Ottawa, February 1997), reported (1998) 8 ICCP 3; Indian Claims Commission, *Inquiry into the 1909 Reserve Land Surrender Claim of the Moosomin First Nation* (March 1997), reported (1998) 8 ICCP 101; Indian Claims Commission, *Inquiry into the 1927 Surrender Claim of the Chippewas of Kettle and Stony Point First Nation* (March 1997), reported (1998) 8 ICCP 209; Indian Claims Commission, *Sumas Indian Band Inquiry, 1919 Surrender of Indian Reserve No. 7* (August 1997), reported (1998) 8 ICCP 281

[480] *Guerin v. The Queen*, [1984] 2 SCR 335.

Moreover, since we have already set forth our views on the implications of these leading cases, there is no need for us to undertake this analysis afresh. However, understanding *Guerin* and *Apsassin* is critical to appreciate the nature and extent of the Crown's fiduciary obligations and to apply those principles to the facts of this inquiry, so it is necessary to set forth the basic facts and legal principles that have emerged from those cases. This we propose to do by relying extensively on the review of the authorities set forth in our earlier reports.

In the course of our analysis, we will consider the issues that have arisen from the cases and our earlier inquiries regarding whether a fiduciary obligation exists in given circumstances – in particular, where the band's understanding of the terms of the surrender is inadequate, where the conduct of the Crown has tainted the dealings in a manner that makes it unsafe to rely on the band's understanding and intention, where the band has ceded or abnegated its decision-making authority to or in favour of the Crown in relation to the surrender, or where the surrender is so foolish or improvident as to be considered exploitative. We will also address the First Nation's submission, relying on the decision of the Federal Court of Appeal in *Semiahmoo Indian Band v. Canada*,[481] that the Crown was obliged to ensure that the surrender was implemented in such a way as to cause the least possible impairment of the Band's rights and to avoid fettering the Band's decision-making power. In applying the jurisprudence to the facts of this case, we will consider whether the Crown failed to satisfy any fiduciary duties to the Duncan's Band and, if so, whether Canada may be said to owe the First Nation an outstanding lawful obligation.

THE *GUERIN* CASE

Although *Guerin* dealt with the fiduciary obligations of the Crown with respect to the sale or lease of Indian reserve lands *after* a band has surrendered its land (post-surrender fiduciary duties), the judgment provides significant guidance in relation to the evaluation of the Crown/aboriginal relationship since it was the first case in which the Supreme Court of Canada acknowledged that the Crown stands in a fiduciary relationship with aboriginal peoples. *Guerin* remains the most authoritative and exhaustive discussion of Crown/aboriginal fiduciary duties by the Supreme Court of Canada and, despite its 1984 vintage, remains good law. In our report dealing with the surrender claim of the Kahkewistahaw First Nation, we discussed the *Guerin* case in these terms:

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[481] *Semiahmoo Indian Band v. Canada*, [1998] 1 FC 3, 148 DLR (4th) 523 (CA) (hereafter *Semiahmoo*).

> In *Guerin*, the Musqueam Band surrendered 162 acres of reserve land to the Crown in 1957 for lease to a golf club on the understanding that the lease would contain the terms and conditions that were presented to and agreed upon by the Band Council. The surrender document that was subsequently executed gave the land to the Crown "in trust to lease the same" on such terms as it deemed most conducive to the welfare of the Band. The Band later discovered that the terms of the lease obtained by the Crown were significantly different from what the Band had agreed to and were less favourable.
>
> All eight members of the Court found that Canada had breached its duty to the Band. On the nature of the Crown's fiduciary relationship, Dickson J (as he then was) for the majority of the Court stated:
>
> > Through the confirmation in the *Indian Act* of the historic responsibility which the Crown has undertaken, to act on behalf of the Indians so as to protect their interests in transactions with third parties, Parliament has conferred upon the Crown a discretion to decide for itself where the Indians' best interests really lie. This is the effect of s. 18(1) of the Act.
> >
> > This discretion on the part of the Crown, far from ousting, as the Crown contends, the jurisdiction of the courts to regulate the relationship between the Crown and the Indians, has the effect of transforming the Crown's obligation into a fiduciary one. Professor Ernest J. Weinrib maintains in his article "The Fiduciary Obligation" (1975), 25 U.T.L.J. 1, at p. 7, that "the hallmark of a fiduciary relation is that the relative legal positions are such that one party is at the mercy of the other's discretion". Earlier, at p. 4, he puts the point in the following way:
> >
> > > [Where there is a fiduciary obligation] there is a relation in which the principal's interests can be affected by, and are therefore dependent on, the manner in which the fiduciary uses the discretion which has been delegated to him. The fiduciary obligation is the law's blunt tool for the control of this discretion.
> >
> > I make no comment upon whether this description is broad enough to embrace all fiduciary obligations. I do agree, however, that where by statute, agreement, or perhaps by unilateral undertaking, one party has an obligation to act for the benefit of another, and that obligation carries with it a discretionary power, the party thus empowered becomes a fiduciary. Equity will then supervise the relationship by holding him to the fiduciary's strict standard of conduct....
> >
> > ... When the promised lease proved impossible to obtain, the Crown, instead of proceeding to lease the land on different, unfavourable terms, should have returned to the band to explain what had occurred and seek the band's counsel on how to proceed. The existence of such unconscionability is

> the key to a conclusion that the Crown breached its fiduciary duty. *Equity will not countenance unconscionable behaviour in a fiduciary, whose duty is that of utmost loyalty to his principal.*[482]

Justice Dickson held that the *Indian Act* surrender provisions interposed the Crown between Indians and settlers with respect to the alienation of reserve lands. He described the source of the fiduciary relationship in these terms:

> In my view, the nature of Indian title and the framework of the statutory scheme established for disposing of Indian land places upon the Crown an equitable obligation, enforceable by the courts, to deal with the land for the benefit of the Indians. This obligation does not amount to a trust in the private law sense. It is rather a fiduciary duty. If, however, the Crown breaches this fiduciary duty it will be liable to the Indians in the same way and to the same extent as if such a trust were in effect.
>
> The fiduciary relationship between the Crown and the Indians has its roots in the concept of aboriginal, Native or Indian title. The fact that Indian Bands have a certain interest in lands does not, however, in itself give rise to a fiduciary relationship between the Indians and the Crown. The conclusion that the Crown is a fiduciary depends upon the further proposition that the Indian interest in the land is inalienable except upon surrender to the Crown.
>
> An Indian band is prohibited from directly transferring its interest to a third party. Any sale or lease of land can only be carried out after a surrender has taken place, with the Crown then acting on the band's behalf. The Crown first took this responsibility upon itself in the Royal Proclamation of 1763 [see RSC 1970, App. I]. It is still recognized in the surrender provisions of the *Indian Act. The surrender requirement, and the responsibility it entails, are the source of a distinct fiduciary obligation owed by the Crown to the Indians.*[483]

The *Guerin* case is instructive for two reasons: first, it determined that the relationship between the Crown and First Nations is fiduciary in nature; second, it clearly established the principle that an enforceable fiduciary obligation will arise in relation to the sale or lease of reserve land by the Crown on behalf of, and for the benefit of, a band to a third party *following* the surrender of reserve land to the Crown in trust. However, the Supreme Court of Canada was not called upon in *Guerin* to address the question whether the Crown owed any fiduciary duties to the band *prior to* the surrender. That issue was not specifically addressed until *Apsassin* appeared on the Court's docket.[484]

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[482] *Guerin v. The Queen*, [1984] 2 SCR 335, 55 NR 161, 13 DLR (4th) 321, [1985] 1 CNLR 120 at 136-37 and 140, Dickson J. Emphasis added.

[483] *Guerin v. The Queen*, [1984] 2 SCR 335, 55 NR 161, 13 DLR (4th) 321, [1985] 1 CNLR 120 at 131-32, Dickson J. Emphasis added.

[484] Indian Claims Commission, *Inquiry into the 1907 Reserve Land Surrender Claim of the Kahkewistahaw First Nation* (Ottawa, February 1997), reported (1998) 8 ICCP 3 at 74-76.

In the Commission's report regarding the surrender claim of the Moosomin First Nation, we added:

> Dickson J noted that "[t]he discretion which is the hallmark of any fiduciary relationship is capable of being considerably narrowed in a particular case.... The *Indian Act* makes specific provision for such narrowing in ss. 18(1) and 38(2)."[485] Accordingly, fiduciary principles will always bear on the relationship between the Crown and Indians, but, depending on the context, a fiduciary duty may be narrowed because the Crown's discretion is lesser and a First Nation's scope for making its own free and informed decisions is greater.[486] Section 49(1) of the 1906 *Indian Act* is an example of such narrowing: although reserve land is held by the Crown on behalf of a band (pursuant to section 19 of that *Act*), it may not be surrendered except with the band's consent. It is this "autonomy" to decide how to deal with reserve land that the Supreme Court considered in *Apsassin*, to which we now turn.[487]"

THE *APSASSIN* CASE

As we have already noted, the leading case regarding the Crown's ***pre-surrender*** duties to First Nations is the Supreme Court of Canada's decision in ***Apsassin***. In discussing this case in the course of its report on the Moosomin surrender claim, the Commission stated:

> In *Apsassin*, the Court considered the surrender of reserve land by the Beaver Indian Band, which later split into two bands now known as the Blueberry River Band and the Doig River Band. The reserve contained good agricultural land, but the Band did not use it for farming. It was used only as a summer campground, since the Band made a living from trapping and hunting farther north during the winter. In 1940, the Band surrendered the mineral rights in its reserve to the Crown, in trust, to lease for the Band's benefit. In 1945, the Band was approached again, to explore the surrender of the reserve to make the land available for returning veterans of the Second World War interested in taking up agriculture.

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[485] *Guerin v. The Queen*, [1984] 2 SCR 335, [1985] 1 CNLR 120, [1984] 6 WWR 481, 13 DLR (4th) 321, 53 NR 161 at 176-77 (SCC)

[486] This view was reaffirmed in *R. v. Sparrow* (1990), 70 DLR (4th) 385, [1990] 3 CNLR 160 (SCC), and most recently by Mr Justice Iacobucci in *Quebec (Attorney-General) v. Canada (National Energy Board)* (1994), 112 DLR (4th) 129 at 147 (SCC), where he states:

> It is now well-settled that there is a fiduciary relationship between the federal Crown and the aboriginal people of Canada: *Guerin v. Canada*.... None the less, it must be remembered that not every aspect of the relationship between fiduciary and beneficiary takes the form of a fiduciary obligation: *Lac Minerals Ltd. v. International Corona Resources Ltd.* (1989), 61 D.L.R. (4th) 14, 26 C.P.R. (3d) 97, [1989] 2 S.C.R. 574. The nature of the relationship between the parties defines the scope, and the limits, of the duties that will be imposed.

[487] Indian Claims Commission, *Inquiry into the 1909 Reserve Land Surrender Claim of the Moosomin First Nation* (Ottawa, March 1997), reported (1998) 8 ICCP 101 at 180.

After a period of negotiations between the Department of Indian Affairs (DIA) and the Director, *Veteran's Land Act* (DVLA), the entire reserve was surrendered in 1945 for $70,000. In 1950, some of the money from the sale was used by DIA to purchase other reserve lands closer to the Band's traplines farther north. After the land was sold to veterans, it was discovered to contain valuable oil and gas deposits. The mineral rights were considered to have been "inadvertently" conveyed to the veterans, instead of being retained for the benefit of the Band. Although the DIA had powers under section 64 of the *Indian Act* to cancel the transfer and reacquire the mineral rights, it did not do so. On discovery of these events, the Band sued for breach of fiduciary duty, claiming damages from the Crown for allowing the Band to make an improvident surrender of the reserve and for disposing of the land at "undervalue."

At trial,[488] Addy J dismissed all but one of the Band's claims, finding that no fiduciary duty existed prior to or concerning the surrender. He also concluded that the Crown had not breached its post-surrender fiduciary obligation with respect to the mineral rights, since they were not known to be valuable at the time of disposition. He found, however, that the DIA breached a post-surrender fiduciary duty by not seeking a higher price for the surface rights.

The Federal Court of Appeal[489] dismissed the Band's appeal and the Crown's cross-appeal. However, the majority rejected Addy J's conclusion regarding a pre-surrender fiduciary duty: they found that the combination of the particular facts in the case and the provisions of the *Indian Act* imposed a fiduciary obligation on the Crown. The content of that obligation was to ensure that the Band was properly advised of the circumstances concerning the surrender and the options open to it, particularly since the Crown itself sought the surrender of the lands to make them available to returning soldiers. On behalf of the majority, Stone JA (with Marceau JA concurring and Isaac CJ dissenting) concluded that the Crown discharged its duty, since the Band had been fully informed of "the consequences of a surrender," was fully aware that it was forever giving up all rights to the reserve, and gave its "full and informed consent to the surrender."[490] Stone JA also found that there was no breach of the post-surrender fiduciary obligation concerning the mineral rights, since there was a "strong finding" that the mineral rights were considered to be of minimal value, so it was not unreasonable to have disposed of them. Finally, once the rights had been conveyed to the DVLA, any post-surrender fiduciary obligation on the part of the Department of Indian Affairs was terminated, and the Crown had no further obligation to deal with the land for the benefit of the Band.

The Supreme Court of Canada divided 4-3 on the question of whether the mineral interests were included in the 1945 surrender for sale or lease. Nevertheless, the Court was unanimous in concluding that the Crown had breached its post-surrender fiduciary obligation to dispose of the land in the best interests of the Band, first, when

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[488] An abridged version of the decision is reported as *Apsassin v. Canada (Department of Indian Affairs and Northern Development)*, [1988] 3 FC 20 (TD), and the complete text is reported as *Blueberry River Indian Band and Doig River Indian Band v. Canada (Minister of Indian Affairs and Northern Development) et al.*, [1988] 1 CNLR 73, 14 FTR 161 (TD).

[489] *Apsassin v. Canada*, [1993] 3 FC 28, 100 DLR (4th) 504, 151 NR 241, [1993] 2 CNLR 20 (Fed. CA).

[490] *Apsassin v. Canada*, [1993] 3 FC 28, 100 DLR (4th) 504, 151 NR 241, [1993] 2 CNLR 20 at 46 (Fed. CA).

> it "inadvertently" sold the mineral rights in the reserve lands to the DVLA, and, second, when it failed to use its statutory power to cancel the sale once the error had been discovered. Justices Gonthier and McLachlin, respectively writing for the majority and the minority, also concluded that, to the extent the Crown owed any pre-surrender fiduciary duties to the band, they were discharged on the facts in that case.
>
> The Court's comments on the question of pre-surrender fiduciary obligation may be divided into those touching on the *context* of the surrender and those concerning the substantive *result* of the surrender. The former concern whether the context and process involved in obtaining the surrender allowed the Band to consent properly to the surrender under section 49(1) and whether its understanding of the dealings was adequate. In the following analysis, we will first address whether the Crown's dealings with the Band were "tainted" and, if so, whether the Band's understanding and consent were affected. We will then consider whether the Band effectively ceded or abnegated its autonomy and decision-making power to or in favour of the Crown.
>
> The substantive aspects of the Supreme Court's comments relate to whether, given the facts and results of the surrender itself, the Governor in Council ought to have withheld its consent to the surrender under section 49(4) because the surrender transaction was foolish, improvident, or otherwise exploitative. We will address this question in the final part of our analysis.[491]

From *Apsassin* it can be seen that the Court has contemplated several distinct sources of the Crown's fiduciary obligation to Indians in the pre-surrender context: where a band's understanding of the terms of the surrender is inadequate; where the conduct of the Crown has tainted the dealings in a manner that makes it unsafe to rely on the band's understanding and intention; where the band has abnegated its decision-making authority in favour of the Crown in relation to the surrender; and where the surrender is so foolish or improvident as to be considered exploitative. We now turn to those issues as well as the submission by the Duncan's First Nation, based on the decision of the Federal Court of Appeal in *Semiahmoo*, that the Crown was obliged to ensure that the surrender was implemented in such a way as to cause the least possible impairment of the Band's rights and to avoid fettering the Band's decision-making power.

Pre-surrender Fiduciary Duties of the Crown

Where a Band's Understanding Is Inadequate or the Dealings Are Tainted

In its report on the *Moosomin* inquiry, the Commission wrote:

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[491] Indian Claims Commission, *Inquiry into the 1909 Reserve Land Surrender Claim of the Moosomin First Nation* (Ottawa, March 1997), reported (1998) 8 ICCP 101 at 181-83.

> For the majority of the Court, Gonthier J focused on the context of the surrender, concerning himself with giving "effect to the true purpose of the dealings" between the Band and the Crown.[492] He wrote that he would have been "reluctant to give effect to this surrender variation if [he] thought that the Band's understanding of its terms had been inadequate, or if the conduct of the Crown had somehow tainted the dealings in a manner which made it unsafe to rely on the Band's understanding and intention."[493]
>
> At the heart of Justice Gonthier's reasons is the notion that "the law treats Aboriginal peoples as autonomous actors with respect to the acquisition and surrender of their lands, and for this reason, their decisions must be respected and honoured."[494] In so holding, he emphasized the fact that the Band had considerable autonomy in deciding whether or not to surrender its land, and that, in making its decision, it had been provided with all the information it needed concerning the nature and consequences of the surrender. Accordingly, in Justice Gonthier's view, a band's decision to surrender its land should be allowed to stand unless the band's understanding of the terms was inadequate or there were tainted dealings involving the Crown which make it unsafe to rely on the band's decision as an expression of its true understanding and intention.[495]

As we noted in the Kahkewistahaw inquiry,[496] Gonthier J did not define what he meant by "tainted dealings," but it is clear that, like McLachlin J, he placed considerable reliance on the following findings of Addy J at trial in concluding that the dealings in that case were not tainted:

> 1. That the plaintiffs had known for some considerable time that an absolute surrender of I.R. 172 was being contemplated;
> 2. That they had discussed the matter previously on at least three formal meetings [sic] where representatives of the Department were present;
> 3. That, contrary to what has been claimed by the plaintiffs, it would be nothing short of ludicrous to conclude that the Indians would not also have discussed it between themselves on many occasions in an informal manner, in their various family and hunting groups;
> 4. That, at the surrender meeting itself, the matter was fully discussed both between the Indians and with the departmental representatives previous to the signing of the actual surrender;

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[492] *Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)* (1995), [1995] 4 SCR 344 at 359, [1996] 2 CNLR 25, 130 DLR (4th) 193, Gonthier J.

[493] *Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)* (1995), [1995] 4 SCR 344 at 362, [1996] 2 CNLR 25, 130 DLR (4th) 193, Gonthier J.

[494] *Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)* (1995), [1995] 4 SCR 344 at 358, [1996] 2 CNLR 25, 130 DLR (4th) 193, Gonthier J.

[495] Indian Claims Commission, *Inquiry into the 1909 Reserve Land Surrender Claim of the Moosomin First Nation* (Ottawa, March 1997), reported (1998) 8 ICCP 101 at 183.

[496] Indian Claims Commission, *Inquiry into the 1907 Reserve Land Surrender Claim of the Kahkewistahaw First Nation* (Ottawa, February 1997), reported (1998) 8 ICCP 3 at 81.

5. That [Crown representatives had not] attempted to influence the plaintiffs either previously or during the surrender meeting but that, on the contrary, the matter seems to have been dealt with most conscientiously by the departmental representatives concerned;
6. That Mr. Grew [the local Indian Agent] fully explained to the Indians the consequences of a surrender;
7. That, although they would not have understood and probably would have been incapable of understanding the precise nature of the legal interest they were surrendering, they did in fact understand that by the surrender they were giving up forever all rights to I.R. 172, in return for the money which would be deposited to their credit once the reserve was sold and with their being furnished with alternate sites near their trapping lines to be purchased with the proceeds;
8. That the said alternate sites had already been chosen by them, after mature consideration.[497]"

In particular, Gonthier J found that Crown officials had fully explained the consequences of the surrender, had not attempted to influence the Band's decision, and had acted conscientiously and in the best interests of the Band throughout the entire process. In other words, although the Court of Appeal and McLachlin J had commented that the Crown was arguably in a conflict of interest because of the presence of conflicting pressures "in favour of preserving the land for the Band on the one hand, and making it available for distribution to veterans on the other,"[498] the Supreme Court was nevertheless able to find, beneath the technical irregularities and confusion over the nature of the surrender, a genuine intention on the part of the Beaver Indian Band, formulated with the assistance of a conscientious Indian Agent, to dispose of reserve land for which it had no use. Thus, the Court had no difficulty in concluding that there was a neat reconciliation of the Crown's interests in opening up good agricultural land for returning soldiers and the Band's interests in selling land it did not use to obtain alternative lands closer to its traplines.

However, where there are "tainted dealings" involving the Crown, caution must be exercised in considering whether or not the band's apparently autonomous decision to surrender the land should be given effect. In *Chippewas of Kettle and Stony Point*, for example, Laskin JA considered that the alleged bribe provided to the Band members by the prospective purchaser of the reserve lands might constitute "tainted dealings." Although he recognized that it was a question for trial which could not be dealt with in Canada's preliminary application for summary judgment, he nevertheless forged the explicit link between "tainted dealings" and fiduciary obligation that Gonthier J was not required to make in the context of *Apsassin*.[499] In our view, Canada's use of its position of authority to apply undue influence on a band to effect a particular result, or its failure to properly manage competing interests, can contribute to a finding of "tainted dealings" involving the Crown. Such a finding may cast doubt on a surrender as the true expression of a band's intention. Both of these elements are relevant to the question of "tainted dealings" because they have the potential to undermine the band's decision-making autonomy with respect to a proposed surrender of reserve land.

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[497] *Blueberry River Indian Band and Doig River Indian Band v. Canada (Minister of Indian Affairs and Northern Development)*, [1988] 14 FTR 161, 1 CNLR 73 at 129-30 (TD).

[498] *Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)* (1995), [1995] 4 SCR 344 at 379, [1996] 2 CNLR 25, 130 DLR (4th) 193, McLachlin J.

Understanding and Intent

In relation to the autonomy of a band to freely decide whether to surrender its reserve lands, the First Nation submits that a truly autonomous decision to surrender requires knowledgeable, uncoerced consent with full understanding of the implications of, and alternatives to, the surrender; in the absence of such understanding, or if the surrender is tainted by coercion, effective autonomous decision-making is negated.[500] According to counsel, the Crown's role as fiduciary is to fully inform the band, as beneficiary, of the breadth, scope, and consequences of the decision the band is making, and this duty is accomplished by making all material information available in a manner that indicates that the information was "understood and appreciated" by the band.[501] Canada agrees that "the requirement that the surrender be assented to by a majority of the male members of the First Nation implies that free and informed consent to the surrender must be given."[502]

Where the parties disagree is with respect to whether the Band *was* fully informed at the time of the surrender. In this respect, the First Nation argues that there could be no clear expression of the Band's understanding and intent when, in the First Nation's view, five of the seven individuals on the voters' list did not reside on or near, and were not interested in the reserves, leaving the intentions of the community resting in the hands of just two eligible voters, one of whom did not even vote.[503] The Commission has already concluded that five of the seven individuals on the voters' list, as well as Alex Mooswah, were eligible to be there, so there is no need to address this argument further.

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[499] *Chippewas of Kettle and Stony Point v. Canada (Attorney General)* (1997), 31 OR (3d) 97 at 106 (CA).

[500] ICC Transcript, November 25, 1997, p. 107 (Jerome Slavik).

[501] ICC Transcript, November 25, 1997, p. 90 (Jerome Slavik).

[502] Michel Roy, Director General, Specific Claims Branch, Indian and Northern Affairs Canada, to Donald Testawich, Chief, Duncan's First Nation, and Jerome Slavik, Ackroyd, Piasta, Roth & Day, January 31, 1997 (ICC Exhibit 11, p. 5).

The First Nation also argues that the facts in this case do not measure up well against the key findings in *Apsassin* relied on by Gonthier and McLachlin JJ. As counsel put it:

> Reading through those criteria, we see in the first one that the Plaintiffs [in *Apsassin*] had known for some considerable time that an absolute surrender was being contemplated. They had had a long time to think about it. Here it was only mentioned a couple [of] years earlier. No evidence of a considerable amount of time of concerted thought and effort about the surrender.
>
> The Indian agent rarely met with the Duncan's people. Mostly he met with them at annuity time. This would make the meetings one year apart. They say [in *Apsassin*] that they had met at least on three formal meetings where representatives of the Department were present, formal meetings, and there was extensive documentation of what was presented at those meetings.
>
> Now, they said that the Indians had a chance in the circumstances there to discuss this between themselves on many occasions in an informal manner. That may have been the case up there where they had a community, but in this case the members were scattered over a hundred-mile-plus radius. It's doubtful whether they had very many occasions at all to meet collectively to discuss the implications, and consequences and options.
>
> Number four, the surrender meeting itself, the matter was fully discussed between the Indians and the Department representatives. There is no evidence that there was a full discussion or even a surrender meeting in this case. Number five, there was no evidence that they attempted to influence the Plaintiff either previously or during a surrender meeting. Here Murison's instructions were go out, bargain, make a deal, get it done whatever it takes. The inducements were handy. He had authority to negotiate the deal on the spot.
>
> It says in six, Mr. Grew fully explained to the Indians the consequences of the surrender. At no point is there any documentary evidence that Laird or Murison explained the consequences of the surrender or the options to the surrender. In fact, we know at times when such options were available, they took no action, took no consultation.
>
> I would point out to number eight there that in this case, the Beaver case, and, sorry, in this Blueberry case [*Apsassin*] and in the Beaver case's surrender, they had had discussions of alternative sites. They knew that they were getting new, and other and different reserves. They had had some discussion in their location. Certainly, that

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[503] ICC Transcript, November 25, 1997, p. 105 (Jerome Slavik).

> requires a fairly lengthy consideration and consultation process on reserve selection if it's anywhere as complicated as it is today.
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> No suggestion, no offer, no indication that that was ever even presented to the Duncan's First Nation.[504]

Counsel for the First Nation suggests that the facts in this case are more akin to those in the Moosomin inquiry than those in *Apsassin*, particularly the evidence regarding the manner in which the vote was taken and the extent to which the terms of the surrender were explained and the Band may be said to have understood them.[505] The main problem, in counsel's view, is that there is no record to indicate when, where, or with whom the surrender was discussed in 1928 or in preceding meetings with Agent Laird; no evidence of the discussion of terms, options, or whether to surrender at all; and no indication that material information was made available to band members to permit them to make the decision in an informed way.[506]

Ultimately, counsel submits that there is no evidence to suggest the existence of the requisite understanding and intention to surrender, given that the surrender document and affidavit were prepared, in the First Nation's submission, before the meeting took place. In this context, the First Nation argues that it is open to the Commission as the trier of fact in this case to give those documents no weight as evidence of band members' understanding and intent.[507] The lack of other significant documentation to record the nature and extent of the discussions "invites an inference that the subject matter of surrender was either not raised or that it was raised in a superficial or speculative manner."[508]

Canada replies that the topic of surrender had a long history with the Duncan's Band prior to 1928,[509] having been raised as early as 1912, since the Band, other than Duncan Testawits, was already not making use of its reserves in the Shaftesbury Settlement area.[510] By the time the surrender was taken, Murison reported that "[t]hese Indians were prepared for me and had evidently discussed the matter very fully amongst themselves, having been notified on August 3rd that an official would meet them some time this year to take up the question of surrender with them."[511] As Director General Michel Roy of the Specific Claims Branch wrote on January 31, 1997:

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[504] ICC Transcript, November 25, 1997, pp. 108-09 (Jerome Slavik).
[505] ICC Transcript, November 25, 1997, pp. 112-13 (Jerome Slavik).
[506] ICC Transcript, November 25, 1997, pp. 90-91 (Jerome Slavik).
[507] Written Submission on Behalf of the Duncan's First Nation, November 12, 1997, p. 58.
[508] Written Submission on Behalf of the Duncan's First Nation, November 12, 1997, p. 14.
[509] Written Submission on Behalf of the Government of Canada, November 17, 1997, p. 29.
[510] ICC Transcript, November 26, 1997, p. 147 (Perry Robinson).

> The evidence indicates that the matter of a surrender was discussed with members of the DFN [Duncan's First Nation] at least three times prior to the date of the surrender. It is of particular note that the subject of the surrender was discussed at treaty time in 1925, 1927 and 1928 when many of the members would have been present. The evidence also indicates that DFN members had indicated a willingness to surrender the lands in question depending upon the terms offered. Inspector Murison's report on the surrender suggests that members of the DNF [sic] had an opportunity to consider and discuss the surrender among themselves prior to the surrender vote. It is Canada's view that the DFN has not sufficiently established that free and informed consent to the surrender of the reserves was lacking.[512]

In the Commission's view, while it is true that there is little documentation of the actual surrender meeting and the discussions that took place there or in previous meetings, there is no evidence to support the conclusion that the Band did not understand the terms of the surrender. In fact, Murison's evidence, corroborated by Angela Testawits, indicates that the Band was prepared for him and indeed negotiated additional terms of the surrender, including the initial payment of $50 per band member, annual payments of interest, and provision of farming implements. Moreover, once the Beaver surrender had been completed, it appears that the Duncan's Band petitioned to be treated in the same manner – that is, by payment of a second instalment of $50 from the sale proceeds to each member of the Band. Particularly significant, in the Commission's view, is the lack of evidence that band members sought to reverse the surrender or to register a complaint that their lands had been stolen or otherwise wrongfully taken from them. From these facts, it seems evident that the Band was aware of the nature of the transaction and, once it was in place, sought to obtain even better terms.

Counsel for the First Nation seeks to distinguish *Apsassin* from the present case on the basis that *Apsassin* featured "*viva voce* [oral] evidence from 'absolutely independent and disinterested' witnesses who described in detail the meetings held, the attendance, the location, the questions raised, and the discussion generally."[513] In the Commission's view, however, it must be recalled that the surrender at issue in *Apsassin* took place in 1945 and the trial occurred in the mid-1980s – a difference of roughly 40 years but still within the life span of some of the participants. The Duncan's surrender took place 17 years earlier, at a time when records appear to have been less religiously kept, and the Commission's inquiry commenced in the mid-1990s – 67 years after the fact. The Commission agrees that it would be preferable to have surviving participants available to explain what took place. However, this case must be decided on the evidence before us, and that evidence points to the conclusion that a meeting was held at which the matter was discussed and negotiated.

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[511] W. Murison, Inspector of Indian Agencies, to W.M. Graham, Indian Commissioner, October 3, 1928, NA, RG 10, vol. 7544, file 29131-5, pt 1 (ICC Documents, p. 253).

[512] Michel Roy, Director General, Specific Claims Branch, Indian and Northern Affairs Canada, to Donald Testawich, Chief, Duncan's First Nation, and Jerome Slavik, Ackroyd, Piasta, Roth & Day, January 31, 1997 (ICC Exhibit 11, pp. 5-6).

[513] Written Submission on Behalf of the Duncan's First Nation, November 12, 1997, p. 58.

Despite this time difference, the present case is in fact consistent with *Apsassin* in a number of respects. The members of the Duncan's Band knew for some time that a surrender was being considered, and appear to have met on several occasions – some in the presence of Crown representatives, others where they discussed the matter among themselves. Despite the scarcity of records regarding the surrender meeting, it appears that the matter was discussed and terms negotiated prior to the actual surrender being signed. Moreover, the members of the Duncan's Band likely understood that, by the surrender, they were giving up forever all their rights in the surrendered reserves in return for an initial cash payment of $50, annual payments of interest, and farm implements and assistance. On the other hand, unlike *Apsassin*, there was no need in this case to give "mature consideration" to the selection of alternative reserve sites; nothing would have been gained in moving the Duncan's Band, since its traplines appear to have been quite scattered in any event.

As for the First Nation's submission that there are similarities between this case and the circumstances that were before the Commission in the Moosomin inquiry – in particular the meagre documentation of the surrender meeting – there are also significant differences. In Moosomin there was no list of eligible voters and no tally of voters for and against the surrender. Since 15 members voted for the surrender, and census statistics for 1909 suggest that the Band had 30 eligible voters, the combination of these factors made it impossible for the Commission to determine whether the surrender provisions of the *Indian Act* were complied with in that case. The Commission further concluded:

> In addition to the ambiguity of the certificate, the absence of any further evidence means that we cannot determine whether a meeting was called according to the Band's rules for the express purpose of considering the surrender proposal. Assum-

> ing there was such a meeting, there are no details of any notice of the meeting, when and to whom notice was given, the number of persons present at the meeting, whether an actual vote was taken, and, if such a vote was taken, the tally of votes for and against the surrender. There is also no evidence of the nature of any discussion with the eligible voters and the extent to which the terms of the surrender were explained to members of the Band. We find it astounding that, although Agent Day was vigilant about communicating virtually every detail of his activities to the Department on other subjects prior to the surrender, he kept no records pertaining to this most important of meetings.
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> The elders' testimony supports the conclusion that some sort of meeting was held and that those present may have signed the surrender document at that time. However, it is not clear whether the 15 men who signed or affixed their marks to the document were aware of what it meant, since there is no evidence of what was discussed at this meeting....
>
> In this case, the surrender document and sworn certificate must be considered in light of the oral history and the Department's own records, both of which raise very real doubts about whether the Band fully understood what was going on with respect to the surrender.... In our view, the combination of all these factors makes it at least arguable that section 49 was not complied with when the surrender was taken in 1909.[514]

By way of contrast, although the documentation in this case is scarce, it is nevertheless sufficient to demonstrate the number of eligible voters in attendance at the surrender meeting, the number voting in favour of the surrender, the manner in which the meeting was summoned, and, to a limited extent, the nature of the discussions and the readiness of the Band to address the issue of surrender. The doubts we expressed in Moosomin are much less evident in this case.

We conclude that the evidence fails to establish that the Band's understanding of the terms of the surrender was inadequate.

"Tainted Dealings"

It will be recalled that Gonthier J in *Apsassin* remarked that he would be reluctant to give effect to the surrender in that case "if the conduct of the Crown had somehow tainted the dealings in a manner which made it unsafe to rely on the Band's understanding and intention." On the facts before him, he agreed with Addy J that the Crown's representatives had not attempted to influence the Beaver Indian Band either before or during the surrender meeting, but rather dealt with the matter "most conscientiously."

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[514] Indian Claims Commission, *Inquiry into the 1909 Reserve Land Surrender Claim of the Moosomin First Nation* (Ottawa, March 1997), reported (1998) 8 ICCP 101 at 178.

In the present case, the Duncan's First Nation has devoted considerable energy to proving that just the sort of tainted dealings eschewed by Gonthier J formed the backdrop to the surrender proceedings in 1928. As to the factors to which the Commission should have regard in determining whether tainted dealings existed, counsel submits:

> So we have to look at what conduct of the Crown and in what circumstances there may have been, first of all, tainting of the dealings in this matter. And we have to look as to whether or not there were improper inducements to Indians in vulnerable circumstances. Whether there was undue haste in procuring a surrender, whether there was indirect coercion, intimidation or improper influence by third parties on the Crown or the Indians and they allowed themselves to be susceptible to this. Whether the Crown adequately and fully informed the Indians of the implications and consequences. All these are facts, circumstances and conduct which must be considered.[515]

According to the First Nation, in Moosomin the Commission emphasized how the Department of Indian Affairs struggled with the question of selling the reserve, and ultimately decided to proceed because the reserve land in that case was useless to the Band and the proceeds from its sale would be required to acquire replacement land closer to the Band's traplines. By way of contrast, in this case, counsel submits that the land was valuable and could have been leased, but, since the Department was intent on pursuing a surrender, the only issue with which it struggled was timing.[516] Whereas the Department in Moosomin fully explained the consequences of the surrender and acted conscientiously in the best interests of the Band, there is no evidence in this case, counsel contends, of the Crown attempting to reconcile competing interests; rather, the Crown bowed to pressure from the Soldier Settlement Board, the Province of Alberta, the municipal district, and local settlers. It also benefited itself by reducing its administrative obligations, and by applying the proceeds of sale, first, to offset the costs of maintaining the Band and, second, to fund benefits that the Crown was already obliged by treaty to provide to the Band.[517]

The First Nation argues that its position is borne out by the Crown's initiation of the surrender process and its active efforts to consummate the transaction. It contends that a litany of facts supports this conclusion:

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[515] ICC Transcript, November 25, 1997, p. 107 (Jerome Slavik).

[516] ICC Transcript, November 25, 1997, p. 110 (Jerome Slavik).

[517] ICC Transcript, November 25, 1997, pp. 113-14 (Jerome Slavik); Written Submission on Behalf of the Duncan's First Nation, November 12, 1997, p. 63.

- According to the First Nation, since he knew the predispositions of Commissioner Graham and Deputy Superintendent General Scott, Agent Laird's immediate reaction to the inadvertent encroachment of farmer A.C. Wright's improvements on IR 151G in 1922 was to suggest the surrender of not only that reserve but also IR 151B, 151C, 151D, 151E, 151F, 151H, and 151K.[518]

- In November 1926, Scott advised Charles Stewart, the Superintendent General of Indian Affairs and Minister of the Interior, that the reserves were not being used to advantage by the Band and that "possibly an agreement to surrender them for sale could be obtained if the matter was brought before the attention of the Indians."[519]

- By late 1927, the Crown had decided on a course of action and at that point "all pretense of neutrality ceased," according to the First Nation.[520] In December of that year Scott advised Stewart of his intention to secure a surrender of all the reserves, except IR 151A, and of his understanding, based on a report by Laird, "that the Indians would be willing to surrender these reserves, excepting 151 A, providing some reasonable inducement is offered."[521]

- Counsel submits that Laird was so keen to obtain surrenders to prove himself to his superiors that he blindly plunged ahead with taking an abortive surrender of IR 151K from Susan McKenzie without establishing the ownership of the reserve, observing the statutory requirements, or waiting for instructions.[522]

- Counsel further submits that, because of Laird's past failures in obtaining surrenders, the Crown sent out Murison, who was much more innovative, competent, and painstaking in bargaining, but who was also prepared to callously disregard the procedural requirements of the *Indian Act*.[523]

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[518] Harold Laird, Acting Indian Agent, to the Assistant Deputy and Secretary, DIA, January 23, 1923, DIAND file 777/30-8, vol. 1 (ICC Documents, p. 150); ICC Transcript, November 25, 1997, p. 22 (Jerome Slavik).

[519] D.C. Scott, DSGIA, to the Superintendent General, DIA, November 25, 1926, DIAND file 777/30-7-151A, vol. 1 (ICC Documents, p. 181); ICC Transcript, November 25, 1997, p. 29 (Jerome Slavik).

[520] Written Submission on Behalf of the Duncan's First Nation, November 12, 1997, p. 16; ICC Transcript, November 25, 1997, p. 30 (Jerome Slavik).

[521] D.C. Scott, DSGIA, to SGIA, December 29, 1927, DIAND file 777/30-8, vol. 1 (ICC Documents, pp. 189-91); ICC Transcript, November 25, 1997, pp. 15-16 and 30 (Jerome Slavik).

[522] ICC Transcript, November 25, 1997, p. 31 (Jerome Slavik).

[523] Written Submission on Behalf of the Duncan's First Nation, November 12, 1997, p. 17; ICC Transcript, November 25, 1997, pp. 20, 32, and 34 (Jerome Slavik).

- Scott's advice to Murison in July 1928 that, having regard for the particular circumstances of Treaty 8, surrenders could be obtained by meeting with individuals or small groups of band members rather than a general assembly of the band shows, in the First Nation's view, that the Department was prepared to override both the *Royal Proclamation* of 1763 and the *Indian Act* "to get the surrender however you can."[524]
- Counsel contends that, "[g]iven Laird's representation of rapidly increasing land values, the representation that the Band had previously had occasion to discuss with Laird the prospects of a surrender, and the ongoing interest among settlers in the land it would seem unlikely that the Band would present Laird with a proposal to surrender significant Reserve land holdings with no idea of what they wanted or expected by way of surrender terms." It was more likely, according to counsel, that "the willingness to surrender the land may have been Laird's evaluation of the propitious timing for seeking a surrender rather than an expressed desire on the part of the Band to depart [sic] with these reserves."[525] Indeed, if Laird was in fact aware of current land prices, then counsel finds it strange that the Crown was not prepared to discuss the likely price the land would fetch and instead merely advised the Band that the land would be sold at public auction at whatever price it might obtain.[526]
- The Crown took a surrender of good agricultural land notwithstanding the expressed desire of some Band members to take up farming. This demonstrated, in the First Nation's view, that the Crown failed to take the Band's best interests into account.[527]

In response, Canada submits that the documents before the Commission do not bear out the First Nation's argument that the Crown acted in a "duplicitous and wrongful manner" by "aggressively" and "ruthlessly" seeking a surrender as a partisan proponent of the interests of local settlers, the municipal district, the Province of Alberta, and "various bureaucrats."[528] Rather, members of the Duncan's Band demonstrated "an independent interest in the issue of the surrender of their own reserves," and it was their "lack of use of these reserves and their own inquiries about the possibility of a surrender [that] contributed to the initiation of the surrender process."[529] Counsel countered the First Nation's list of facts tending to show that Canada proposed the surrender with his own list of facts showing that the Band initiated the surrender process and that Canada in fact took steps to protect the Band's interests:

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[524] ICC Transcript, November 25, 1997, pp. 35-36 (Jerome Slavik).

[525] Written Submission on Behalf of the Duncan's First Nation, November 12, 1997, p. 15.

[526] ICC Transcript, November 25, 1997, p. 44 (Jerome Slavik).

[527] Written Submission on Behalf of the Duncan's First Nation, November 12, 1997, p. 20; ICC Transcript, November 25, 1997, p. 47 (Jerome Slavik).

[528] ICC Transcript, November 26, 1997, p. 138 (Perry Robinson).

- In response to a request in 1919 by Brigadier-General W.A. Griesbach, the Member of Parliament for Edmonton West, to throw open the reserves for settlement, Graham replied that "[i]t seems strange to me that the Indians should be called upon to surrender lands in that district at this early date, as there must be large areas of dominion lands available." He added: "I do not think we should attempt to get these lands surrendered until such time as other available lands in the district are exhausted."[530]
- In July 1925, Secretary-Treasurer E.L. Lamont of the Municipal District of Peace noted that "[t]he above Indian Reserves situated within the boundaries of this Municipal District have been unoccupied for many years and the few Indians left who were attached thereto have expressed a wish to surrender this land in accordance with the provisions of the Indian Act."[531] Counsel for Canada submits that this letter demonstrates that the Band was willing to surrender its reserves.[532]
- A.F. MacKenzie, the Acting Assistant Deputy and Secretary of Indian Affairs, advised Lamont in September 1925 that "the Department is not disposed to proceed further with the matter, in view of the fact that the present current land values in that district are very low."[533] Although MacKenzie added that the Department might be prepared to further consider the matter if land prices were to increase, Canada contends that the refusal to sell the land when prices were low was in keeping with the Crown's fiduciary obligation to protect the Band from an exploitative transaction.[534]
- With regard to Scott's letter to Stewart in November 1926, referred to by the First Nation as evidence that a surrender "possibly ... could be obtained

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[529] Written Submission on Behalf of the Government of Canada, November 17, 1997, p. 6, notes 8 and 10.

[530] W.M. Graham, Commissioner, to D.C. Scott, DSGIA, July 17, 1919, NA, RG 10, vol. 7535, file 26131-3 (ICC Documents, p. 104); ICC Transcript, November 26, 1997, p. 139 (Perry Robinson).

[531] E.L. Lamont, Secretary-Treasurer, Municipal District of Peace, to Secretary, DIA, July 7, 1925, DIAND file 777/30-7-151A, vol. 1 (ICC Documents, p. 174).

[532] ICC Transcript, November 26, 1997, p. 139 (Perry Robinson).

[533] A.F. MacKenzie, Acting Assistant Deputy and Secretary, DIA, to E.L. Lamont, Secretary-Treasurer, Municipal District of Peace, September 3, 1925, DIAND file 777/30-7-151A, vol. 1 (ICC Documents, p. 180).

[534] ICC Transcript, November 26, 1997, p. 141 (Perry Robinson).

if the matter was brought before the attention of the Indians," Canada notes that Scott went on to say that Indian Affairs considered a surrender "inadvisable" at that time. Scott continued, "It seems to me that if land prices are very low in this vicinity, plenty of farming lands must be available to purchase, and it would not be to the advantage of the Indian owners to dispose of their reserves at the present time."[535] Counsel for Canada argues that the Crown once again pre-empted a surrender to protect the Band's interests.

- On July 14, 1927, Laird reported that he had been "requested to take up the matter with the Department, regarding the surrendering of several reserves, belonging to the Indians of the above named [Duncan's] Band," including IR 151, 151B, 151C, 151D, 151E, 151F, 151G, and 151H.[536] In Canada's view, this request could only have come from the Band.[537]
- J.D. McLean, the Secretary and Assistant Deputy Superintendent General of Indian Affairs, wrote to Laird on November 23, 1927:

  > The Department is prepared to give consideration to the question of a surrender of these reserves for sale and settlement, but before proceeding further, it will be necessary to ascertain what terms and conditions the Band would be prepared to accept....
  >
  > If the Indians are prepared to surrender these reserves, and to permit the Department to offer them for sale by public auction at some opportune time in the near future, we are prepared to go ahead with the matter. On the other hand, it may be that they have in mind some upset price or other condition which they would insist upon before granting a surrender.[538]

  Counsel for Canada submits that this letter shows that it is unwarranted to conclude, as the First Nation would invite the Commission to do, that the Crown proposed and ruthlessly pursued the surrender.[539]
- Finally, Canada refers to Laird's letter of December 6, 1927, in which he advised McLean that the Band had asked him in July of that year "what terms the Government would offer,"[540] as well as Laird's letter of March 10,

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[535] D.C. Scott, DSGIA, to the Superintendent General, DIA, November 25, 1926, DIAND file 777/30-7-151A, vol. 1 (ICC Documents, p. 181).

[536] Harold Laird, Acting Indian Agent, to Assistant Deputy and Secretary, DIA, October 21, 1927, DIAND file 777/30-8, vol. 1 (ICC Documents, p. 186).

[537] ICC Transcript, November 26, 1997, pp. 142-43 (Perry Robinson).

[538] J.D. McLean, Assistant Deputy and Secretary, DIA, to Harold Laird, Acting Indian Agent, November 23, 1927, DIAND file 777/30-8, vol. 1 (ICC Documents, p. 187).

[539] ICC Transcript, November 26, 1997, pp. 143-45 (Perry Robinson).

[540] Harold Laird, Indian Agent, to Assistant Deputy and Secretary, DIA, December 6, 1927, DIAND file 777/30-8, vol. 1 (ICC Documents, p. 188).

> 1928, in which he stated: "I shall no doubt, receive enquiries as to whether any action has been taken re the suggested surrender of their small reserves, therefore I would like to be informed if the Department is considering the matter of taking a surrender this coming Summer."[541] These letters, as well as the preceding ones, reveal, in Canada's submission, the Band's interest in selling its own reserves and the Department's resistance to selling the reserves when, in view of low prices, it did not appear to be in the Band's best interest. Moreover, the fact that the Band wanted to sell part of its reserves is not surprising, counsel contends, since IR 151A became the most important reserve at an early date while the others ceased being used to any great extent.[542]

In short, Canada argues that the evidence does not support the conclusion that the Band was unduly influenced or pressured by the Crown in the course of the surrender being taken.[543] Furthermore, the First Nation's allegations of forgery in the execution of the surrender documents amount, in Canada's submission, to an accusation of fraud, requiring a standard of proof higher than a balance of probabilities, although not as strict as the criminal requirement of proof beyond a reasonable doubt. In either event, the First Nation has not, in counsel's view, satisfied the requirement.[544]

The Commission is inclined to agree with Canada's submissions on this issue. Counsel for the First Nation seeks to paint a picture of a surrender taking place over a background of conspiracy by Canada's representatives to dispossess the Duncan's Band of its land in favour of local settlers and other more powerful interests. Both parties have pointed fingers, claiming that the other side initiated the surrender, but the evidence does not categorically support either position. The fact that the parties were able to selectively pick and choose facts in support of their respective arguments illustrates that both Canada and the Band may have had an interest in consummating the surrender – in Canada's case, to make land available for settlement, and, in the Band's case, to dispose of reserve lands that were of no immediate benefit in exchange for cash payments, annual interest payments, and the provision of stock, farm implements, and building materials.

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[541] Harold Laird, Indian Agent, to Assistant Deputy and Secretary, DIA, March 10, 1928, DIAND file 777/30-8, vol. 1 (ICC Documents, p. 196).

[542] ICC Transcript, November 26, 1997, pp. 145-47 (Perry Robinson).

[543] Written Submission on Behalf of the Government of Canada, November 17, 1997, p. 34.

[544] Written Submission on Behalf of the Government of Canada, November 17, 1997, pp. 34-35.

We are struck by the Crown's relatively non-committal stance regarding this surrender until a decision was made in late 1927 or early 1928 to proceed. The First Nation contends that, at this point, the Crown lost "all pretense of neutrality," but we do not view the Crown's decision in those terms. Rather, we have considered it in the context of the first of Scott's guidelines to his Indian agents for taking surrenders of reserve land. The guideline states:

> 1. A proposal to submit to the Indians the question of the surrender of an Indian reserve or any portion thereof must be submitted by an officer of the Department for approval by the Superintendent General or his deputy, upon a memo setting forth the terms of the proposed surrender and the reasons therefor.[545]

Unlike subsection 51(4) of the 1927 *Indian Act*, which contemplates the Crown granting or withholding its assent to the surrender ***after*** a band's consent being given, this guideline suggests approval of a surrender by the Superintendent General of Indian Affairs ***before*** the matter is even taken up with the band. It precedes all the other surrender guidelines dealing with questions such as notice and conduct of the surrender meeting, voter eligibility, majority assent, and certification of the result. In other words, it appears to set forth a Crown policy that a surrender should be vetted by the Department at the outset so that a preliminary determination can be made as to whether the Crown would be prepared to support the disposition of reserve land.

In our view, this is precisely what took place in relation to the Duncan's Band. A number of proposals were brought forward for consideration by the Crown in the early 1920s, but most were considered premature since other land was available and prices were low. There was no need even to consider displacing the Indians, and, rather than acting as an active proponent of surrender, the Crown instead refused to proceed. However, as more settlers entered the area and land became more scarce, prices rose and the Department was again called upon to make a decision as to whether it would permit reserve lands to be surrendered for settlement purposes. It is significant that, in this period, the Crown remained largely non-committal, indicating that, if the Band was prepared to surrender its reserves, the Crown would likewise be willing to proceed, subject to determining "what terms and conditions the

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[545] Duncan Campbell Scott, DSGIA, "Instructions for Guidance of Indian Agents in Connection with the Surrender of Indian Reserves," May 15, 1916, NA, RG 10, vol. 7995, file 1/34-1-0 (ICC Exhibit 10, tab A).

Band would be prepared to accept." Once the Crown had expressed its willingness to proceed, however, it moved resolutely towards convening a surrender meeting and placing the matter before the Band's eligible voters, but there is no evidence to suggest that it employed unscrupulous methods to force or trick the Band into surrendering its unused reserves. Even Scott's willingness to permit Murison to obtain surrenders from individuals or small groups rather than at a general meeting or council of a band appears to have been motivated more by questions of practicality than malevolence or corruption.

We find support for these conclusions in the evidence of Angela Testawits. In recounting the details of the surrender meeting, Angela remarked:

> The officials told him [Joseph Testawits] there isn't a figure that we can count with in terms of money entitled to each individual with the amount of land you have sold, *now what do you want to do*? He replied, "as long as there is one of my people left, every fall and spring money should be given to them." His other request was that if someone wanted to farm, he should be provided with a tractor and implements, that was what he wanted, we never saw any of these things. We received $200 in the fall and the same in the spring but since my husband died we didn't even get $50. But we haven't received anything in a very long time.[546]

The key words in this passage, in our view, are "what do you want to do?" These words are not the language of tainted dealings, but of the Crown, in response to a proposal to surrender reserve land, and having indicated its readiness to go forward, asking whether the Band was prepared to do so as well. This is not a case like Kahkewistahaw, where the Crown's representatives said in so many words that they intended to take a surrender, before descending in the dead of winter with money in hand to coerce a surrender from starving and destitute people. The record in this inquiry conveys none of the sense of urgency or single-minded purpose that characterized the surrender dealings with the Kahkewistahaw people, nor does this case feature a sudden, unexplained reversal of the Band's position like the one that occurred in Kahkewistahaw.

With regard to the surrender documents, we have already stated that the process of touching the pen is a reasonable explanation for the similarities in the voters' marks on a given document and the dissimilarities in a given voter's marks from document to document. We remain unconvinced that the surrender documents were forged, and we agree with Canada's argument that the requirements for proof of fraud have not been met. In conclusion, we see nothing else in the conduct of the Crown that might have tainted the dealings in a manner that would make it unsafe to rely on the Band's understanding and intention.

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[546] Interview of Angela Testawits, December 5, 1973, p. 3 (ICC Exhibit 6, tab G). Emphasis added.

Where a Band Has Ceded or Abnegated Its Power to Decide

In the Commission's report dealing with the 1907 surrender by the Kahkewistahaw Band, we addressed in some detail Justice McLachlin's reasons concerning the Crown's fiduciary obligations in the pre-surrender context. In considering whether the Crown owes a fiduciary obligation to a band in those circumstances, McLachlin J drew on several Supreme Court decisions dealing with the law of fiduciaries in the private law context:

> Generally speaking, a fiduciary obligation arises where one person possesses unilateral power or discretion on a matter affecting a second "peculiarly vulnerable" person: see *Frame v. Smith*, [1987] 2 SCR 99 [[1988] 1 CNLR 152 (abridged version)]; *Norberg v. Wynrib*, [1992] 2 SCR 226; and *Hodgkinson v. Simms*, [1994]3 SCR 377. The vulnerable party is in the power of the party possessing the power or discretion, who is in turn obligated to exercise that power or discretion solely for the benefit of the vulnerable party. A person cedes (*or more often finds himself in the situation where someone else has ceded for him*) his power over a matter to another person. The person who has ceded power *trusts* the person to whom power is ceded to exercise the power with loyalty and care. This is the notion at the heart of the fiduciary obligation.[547]

In analysing this passage, the Commission stated the following in the Kahkewistahaw report:

> On the facts in *Apsassin*, McLachlin J found that "the evidence supports the view that *the Band trusted the Crown to provide it with information as to its options and their foreseeable consequences, in relation to the surrender* of the Fort St. John reserve and the acquisition of new reserves which would better suit its life of trapping and hunting. *It does not support the contention that the band abnegated or entrusted its power of decision over the surrender of the reserve to the Crown*." Because the Band had not abnegated or entrusted its decision-making power over the surrender to the Crown, McLachlin J held that "the evidence [did] not support the existence of a fiduciary duty on the Crown prior to the surrender of the reserve by the Band."

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[547] *Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)* (1995), [1995] 4 SCR 344 at 371-72, [1996] 2 CNLR 25, 130 DLR (4th) 193, McLachlin J. Emphasis added.

> Justice McLachlin's analysis on what constitutes a cession or abnegation of decision-making power is very brief, no doubt because the facts before her demonstrated that the Beaver Indian Band had made a fully informed decision to surrender its reserve lands and that, at the time, the decision appeared eminently reasonable. In our view, it is not clear from her reasons whether she merely reached an evidentiary conclusion when she found that the Band had not ceded or abnegated its decision-making power to or in favour of the Crown, or whether she intended to state that, as a principle of law, a fiduciary obligation arises only when a band actually takes no part in the decision-making process at all.[548]

After considering further jurisprudence from the Supreme Court of Canada on the question of what is required to cede or abnegate decision-making power to or in favour of a fiduciary, the Commission continued:

> Both *Norberg*[549] and *Hodgkinson*[550] suggest that decision-making authority may be ceded or abnegated even where, in a strictly technical sense, the beneficiary makes the decision. Neither case deals with the fiduciary relationship between the federal government and an Indian band, however, and therefore *Apsassin* must be considered the leading authority on the question of the Crown's pre-surrender fiduciary obligations. In reviewing that case, we cannot imagine that McLachlin J intended to say that the mere fact that a vote has been conducted in accordance with the surrender provisions of the *Indian Act* precludes a finding that a band has ceded or abnegated its decision-making power. If that is the test, it is difficult to conceive of any circumstances in which a cession or abnegation might be found to exist.
>
> We conclude that, when considering the Crown's fiduciary obligations to a band, it is necessary to go behind the surrender decision to determine whether decision-making power has been ceded to or abnegated in favour of the Crown. In our view, a surrender decision which, on its face, has been made by a band may nevertheless be said to have been ceded or abnegated. The mere fact that the band has technically "ratified" what was, in effect, the Crown's decision by voting in favour of it at a properly constituted surrender meeting should not change the conclusion that the decision was, in reality, made by the Crown. Unless the upshot of Justice McLachlin's analysis is that the power to make a decision is ceded or abnegated *only* when a band has completely relinquished that power in *form* as well as in *substance*, we do not consider the fact of a band's majority vote in favour of a surrender as being determinative of whether a cession or abnegation has occurred. Moreover, if the test is anything *less* than complete relinquishment in form and substance, it is our view that the test has

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[548] Indian Claims Commission, *Kahkewistahaw First Nation Report on 1907 Reserve Land Surrender Inquiry*(Ottawa, February 1997), reported (1998) 8 ICCP 3 at 85-86. Footnotes deleted.
[549] *Norberg v. Wynrib*, [1992] 4 WWR 577 at 622-3 (SCC), McLachlin J.
[550] *Hodgkinson v. Simms*, [1994] 9 WWR 609 at 645 (SCC), La Forest J.

> been met on the facts of this case – the Band's decision-making power with regard to the surrender was, in effect, ceded to or abnegated in favour of the Crown.[551]

It is in the context of the foregoing comments from the *Apsassin* case and the Kahkewistahaw inquiry that counsel for the Duncan's First Nation argues that a surrender, even if apparently valid on its face, may still simply reflect the will of the Department of Indian Affairs and not the surrendering band. It becomes necessary to look behind the decision to determine whether the power to make that decision was ceded to or abnegated in favour of the Crown. According to the First Nation, the question turns in large measure on the Band's *capacity*, and accordingly its *control* of the surrender process:[552]

> We would ask you to consider whether or not the autonomy of the Band was really there, because the autonomy of the Band relates to their ability to take, as she [McLachlin J in *Apsassin*] says, a measure of control over the surrender process both in terms of understanding the process by which it occurs, the terms on which it occurs and having the capacity to assert such control.
>
> There is no evidence here that this Band had any capacity whatsoever to effectively control this process, to assess its merits, to control its timing, location, events, to acquire the information. It was completely reliant on the Department in terms of the process, the terms, et cetera.
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> He [Murison] alleged that the Band had input into the process, that they asked for the surrender implements. That's not what the record shows. That's what Murison's letter says, but that surrender document, according to Mr. Reddekopp and according to a clear reading of it, was unchanged from the day it was sent out. There was no control over the terms.
>
> So in short, we feel that the circumstances of the Band led to no control and an abnegation of the decision-making authority of the Band in effect.[553]

Another indication of such cession or abnegation is the state of the band's leadership, as the Commission noted in the Kahkewistahaw inquiry. Counsel for the First Nation points out that the Duncan's Band had no Chief and lacked formal leadership, and many of its members did not speak, read, or write English or have any familiarity with commercial agricultural practices. In the absence of independent advisers, they were, in counsel's submission, vulnerable to ongoing external pressures to surrender their reserves, and, like their counterparts at Kahkewistahaw, relied on, and indeed effectively ceded their decision-making power to, the Crown.[554] According to the First Nation, the Crown represented the Band's only adviser regarding the implications, benefits, and drawbacks of the surrender,[555] and, based on the reasoning of Isaac CJ in *Semiahmoo*, was obliged "to ensure that the Band's discretion was not fettered by a belief that the surrender was inevitable" or by the belief that the pressure to surrender would continue unabated if the surrender was not granted.[556] Instead of providing impartial advice, however, Murison took advantage of the Band's vulnerability to secure the surrender, according to the First Nation.[557] It would have been more appropriate, counsel contends, for the Crown to refrain from taking the surrender until the Band had leaders in place who could address the decision in a more structured way, such as the traditional community decision-making process described by John Testawits.[558] However, given that the Crown *was* the sole adviser, it becomes necessary to determine whose interest was being served by the decision and thus who really made the decision. In this case, according to the First Nation, it was the Crown's interest and decision.[559]

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[551] Indian Claims Commission, *Kahkewistahaw First Nation Report on 1907 Reserve Land Surrender Inquiry* (Ottawa, February 1997), reported (1998) 8 ICCP 87.

[552] ICC Transcript, November 26, 1997, pp. 228-29 (Jerome Slavik).

[553] ICC Transcript, November 26, 1997, pp. 219-20 (Jerome Slavik).

Canada too focuses on capacity and control as critical criteria in assessing whether a band's power to surrender has been ceded or abnegated. It also agrees that a fiduciary obligation may arise where band members entrust to Canada their power of decision over the surrender of their reserves.[560] However, unlike the First Nation, Canada is of the view that "[t]he decision to surrender, or not to surrender, remained with the Duncan band throughout the surrender process"[561] and was not ceded to, or abnegated in favour of, Canada in relation to the surrender of IR 151 and IR 151B through IR 151G.[562] As counsel stated in oral submissions:

> Now, what I've been suggesting when I initially began to review all the pre-surrender documentation leading up to the surrender, is that there has been a third party

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[554] ICC Transcript, November 25, 1997, p. 60 (Jerome Slavik).

[555] Written Submission on Behalf of the Duncan's First Nation, November 12, 1997, p. 21.

[556] Written Submission on Behalf of the Duncan's First Nation, November 12, 1997, p. 64. This argument is drawn from the reasons of the Federal Court of Appeal in *Semiahmoo Indian Band v. Canada*, [1998] 1 FC 3, 148 DLR (4th) 523 (CA), which we will be considering at greater length later in this report.

[557] Written Submission on Behalf of the Duncan's First Nation, November 12, 1997, p. 21.

[558] ICC Transcript, November 25, 1997, p. 115 (Jerome Slavik).

[559] ICC Transcript, November 25, 1997, pp. 118-19 (Jerome Slavik).

[560] Michel Roy, Director General, Specific Claims Branch, Indian and Northern Affairs Canada, to Donald Testawich, Chief, Duncan's First Nation, and Jerome Slavik, Ackroyd, Piasta, Roth & Day, January 31, 1997 (ICC Exhibit 11, p. 6).

[561] Written Submission on Behalf of the Government of Canada, November 17, 1997, p. 28.

[562] Michel Roy, Director General, Specific Claims Branch, Indian and Northern Affairs Canada, to Donald Testawich, Chief, Duncan's First Nation, and Jerome Slavik, Ackroyd, Piasta, Roth & Day, January 31, 1997 (ICC Exhibit 11, p. 6).

> interest in this land, but the Crown's conduct in securing the surrender was not ruthless. It was not partisan. There was not a surrender fever here. The Band itself, the evidence discloses, had reason to want to surrender their reserves, because they were not using the reserves that they surrendered; and the Band itself had been making independent inquiries of the Department as to the possibility of a surrender. It's not a situation where the Band has abnegated their decision-making responsibility.[563]

Counsel further notes that, contrary to the First Nation's submission, the evidence demonstrates that the Duncan's Band had structures of leadership, with Joseph Testawits being identified by John Testawits as a headman. Moreover, the surrender provisions of the 1927 *Indian Act* required consent from a majority of the male members of the Band over the age of 21 years at a meeting convened for the purpose of considering the surrender, but those provisions do not stipulate that a surrender cannot be given unless the Band has a council formally elected in accordance with the Act.[564]

Canada also relied on evidence of the Band's actions following the surrender as relevant in determining whether the Band had ceded or abnegated its decision-making power in granting the surrender. Counsel noted that, after negotiating a single payment of $50 per person from the proceeds of sale of the surrendered land and later discovering that the Beaver Band had negotiated two such payments, members of the Duncan's Band sought a second $50 payment of their own and even presented Agent Laird with a petition to that effect – "[a]rather unusual course of conduct for a Band that had its land stolen from under them and didn't know that the land had in fact been surrendered."[565] In 1930, the Band also retained a law firm because of the federal government's alleged failure to comply with the terms of the surrender with regard to agricultural implements.[566] In counsel's view, these actions were similar to the requests by the bands in *Chippewas of Kettle and Stony Point* and the Sumas inquiry to complete the respective sales and pay the outstanding balances of the purchase prices – actions which were "consistent with [their] free and informed consent to the surrender[s]" and which suggest that the bands never abnegated their decision-making power.[567]

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[563] ICC Transcript, November 26, 1997, p. 188 (Perry Robinson).

[564] ICC Transcript, November 26, 1997, pp. 188-89 (Perry Robinson).

[565] ICC Transcript, November 26, 1997, p. 191 (Perry Robinson).

[566] Written Submission on Behalf of the Government of Canada, November 17, 1997, p. 32. It is notable that the Peace River firm retained by the Band included William P. Dundas, the lawyer before whom Band members Eban Testawits, James Boucher and Joseph Testawits swore the surrender affidavit in Waterhole, Alberta, in September 1928.

[567] Written Submission on Behalf of the Government of Canada, November 17, 1997, pp. 31-32.

The First Nation's reply to these submissions about the Band's post-surrender activities is that they should be given little weight for three reasons. First, those activities were, in counsel's submission, irrelevant to the issue of statutory compliance; second, they have no impact on the Crown's conduct and the Band's understanding or control – and thus autonomy – at the time of surrender; and, third, the request for the second payment of $50 merely represented the Band's effort to make the best of a bad situation. As counsel stated:

> Well, if your goose is cooked, you might as well eat it. The deal was done for them or to them. Once the reserves are gone, this Band had no capacity, no resources to do what? Bring a legal action in the circumstances? The prohibitions in the Indian Act against bringing such claims are very clear at that time.[568]

In the Commission's view, although there is a minor parallel with the Kahkewistahaw inquiry in that the Duncan's Band did not have a Chief at the time of surrender, there are too many significant differences for us to reach the same conclusion. The Duncan's Band may not have had a Chief, but we see nothing in this case like the leadership void so evident on both the Kahkewistahaw and Moosomin reserves. Furthermore, there is no evidence in this case that the Band was actually *prevented* from selecting a Chief or that steps were taken to restrain band members from seeking outside advice, as occurred in Kahkewistahaw.

In Kahkewistahaw, the Band had rebuffed previous attempts to secure a surrender but, five days after voting down one surrender proposal, it did a complete about-face, giving up virtually all its good agricultural lands after receiving cash inducements and being threatened, while in desperate straits during a harsh prairie winter, with the curtailment of all future government aid. Similarly, we saw in the Moosomin inquiry that, while the Band consistently expressed the desire to retain its reserve, Indian Agent J.P.G. Day was censured by the Department of Indian Affairs for his failed attempt to secure a surrender in 1908 prior to the eventual surrender in 1909. No events like these took place on the Duncan's reserves. Nor do we see ongoing reports of persistent efforts like those of Indian Agent Peter Byrne to seek a surrender in the Sumas case – efforts that, despite our finding that Byrne had not applied undue pressure on the Indians against their will, nevertheless warranted our close scrutiny of the surrender in light of the competing interests that the Crown must balance in any such transaction.

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[568] ICC Transcript, November 26, 1997, p. 220 (Jerome Slavik).

Moreover, in the present inquiry, we have already addressed the First Nation's submission that the surrender documents, having been prepared in advance, demonstrate that the Band had no input into or control over the surrender process. In our view, the documents were prepared *at* or *following* the surrender meeting, and we infer from Murison's report of October 3, 1928, and from Angela Testawits's evidence that band members, led by Joseph Testawits, actively participated in the discussions and, indeed, negotiated terms.

We have had careful regard for the Duncan's First Nation's arguments, based on *Semiahmoo*, that its ancestors' sense of powerless in the face of the "inevitable" loss of their reserve lands fettered their ability to make an autonomous decision. To properly understand the First Nation's allegation of the Crown's corresponding obligation "to ensure that the Band's discretion was not fettered by a belief that the surrender was inevitable," or by the belief that the pressure to surrender would continue unabated if the surrender were not granted, it is necessary to review the facts in *Semiahmoo*.

The factual background to the *Semiahmoo* case began in 1889 when the federal government set apart a reserve comprising 382 acres of land for the Semiahmoo Indian Band of British Columbia. The reserve is located just north of the international border between Canada and the United States adjacent to Semiahmoo Bay. In 1928, the federal Department of Public Works expropriated 15.78 acres of the reserve without the Band's consent, but this land was transferred to the Province of British Columbia in 1936 when it became apparent that the Department did not require it. Canada acquired a further 5.74 acres of the reserve from the Band by means of a surrender in 1943, and the land was turned over to the Province for use as a provincial park.

In 1949, the federal Department of Public Works began to consider the possibility that Canada's customs facilities at the Douglas Border Crossing adjacent to the Band's reserve would have to be expanded. An initial proposal to the Band that year was rejected, but in 1951 the Band agreed to a more formal proposal to surrender 22.408 acres for $550 per acre. Reed J at trial found that the Band would not have surrendered the land in the normal course of events, but knew from its previous experience that Canada had the right to expropriate for public purposes if the Band refused to surrender. The headnote from the case succinctly sets forth the remaining relevant facts:

> The purpose of the surrender was to improve customs facilities adjacent to the reserve. However, most of the land was not used for that or any other purpose, but the Crown retained title to it. The Indian band made inquiries about having the unused land returned on many occasions, beginning in 1962. In 1969 it became apparent from a consultant's report that the land would not be used for an expanded customs facility in the foreseeable future, so the band formally sought to recover the land. It made further inquiries about recovering the land several times thereafter. However, the band was always told that the land was needed in the foreseeable future for expansion of the customs facility, or that a study was being prepared regarding its development. In 1987 the band sought legal advice, after which the Crown retained consultants to prepare a study. It recommended development of a resort on the land. The report was sent to the band in 1989. In 1990 the band brought an action alleging that the Crown breached its fiduciary duty to the band with respect to the 1951 surrender in failing to obtain an adequate price and in failing to protect the best interests of the band when it consented to an absolute surrender of the land. Thereafter the Crown commissioned a study that recommended redevelopment of the customs facilities. The report of the study was not received until 1992.[569]

As Isaac CJ noted, "[t]hat study was commissioned and completed on the *assumption* that the existing facility was inadequate."[570]

In addressing the fiduciary obligation that can arise out a band's perception that the loss of its reserve lands is inevitable, Isaac CJ applied to the facts in *Semiahmoo* the guidelines formulated by Wilson J in *Frame v. Smith*[571] for determining whether a fiduciary relationship exists:

> [I]n *Frame v. Smith*, Wilson J. proposed the following indicia of a fiduciary relationship:
>
> (1) The fiduciary has scope for the exercise of some discretion or power.
> (2) The fiduciary can unilaterally exercise that power or discretion so as to affect the beneficiary's legal or practical interests.
> (3) The beneficiary is peculiarly vulnerable to or at the mercy of the fiduciary holding the discretion or power....
>
> In virtually all cases dealing with reserve land, the Crown has considerable power over the affected Indian Band by virtue of the surrender requirement. In this case, however, the Band was particularly vulnerable to the influence of the Crown. The

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[569] *Semiabmoo Indian Band v. Canada*, [1998] 1 FC 3, 148 DLR (4th) 523 at 523-24 (CA).
[570] *Semiabmoo Indian Band v. Canada*, [1998] 1 FC 3, 148 DLR (4th) 523 at 533 (CA).
[571] *Frame v. Smith*, [1987] 2 SCR 99, 42 DLR (4th) 81.

> evidence indicates that land had been taken from the Band by expropriation before and that, prior to the 1951 surrender, Public Works was considering expropriation as a means of obtaining the reserve land at issue in this case.... It is clear from the reasons of the Trial Judge that the Band's discretion to give or to withhold their consent to the 1951 surrender was significantly influenced by their knowledge that, regardless of their decision on the issue of surrender, there was a risk that they would lose their land through expropriation in any event....
>
> The Trial Judge also found that the Band's ability to give or to withhold their own consent to the absolute surrender in 1951 was fettered by their knowledge of the respondent's power to expropriate. In her reasons for judgment, the Trial Judge stated the following:
>
> > It is important to underline that the band knew that the defendant, at all times, had the right to expropriate the land for public purposes if the band refused to surrender. Secondly, I agree with counsel for the plaintiff's characterization of the evidence that the band would not have surrendered the land, in the normal course of events, even though they might have subdivided it for occupation by others under long-term leases....
>
> The respondent's assertion that the Band gave full and informed consent to the absolute surrender rings hollow in the face of these findings. In my respectful view, in finding that the Band surrendered their land to the respondent despite the fact that they "would not have surrendered the land, in the normal course of events" the Trial Judge concluded, based on the evidence, that the Band felt powerless to decide any other way....
>
> In failing to alleviate the Band's sense of powerlessness in the decision-making process, the respondent failed to protect, to the requisite degree, the interests of the Band.[572]

In the present case, there is no evidence that the Duncan's Band was conscious of the possibility of expropriation and no indication that its members were influenced by such considerations. As to whether the circumstances otherwise resulted in the Band feeling powerless to decide in any other way, we acknowledge that most members of the Band may have been illiterate and could not speak, read, or write in English, but we do not necessarily equate those circumstances with powerlessness or incapacity. In fact, in this case, the evidence suggests the opposite. The Band's members appear to have been largely independent and self-supporting, and were not reliant on either the reserves or each other to sustain themselves. In the surrender of IR 151 and 151B through 151G, they were not faced with the prospect of losing their primary livelihood, but instead were disposing of lands of which they made very little use in exchange for an immediate cash payment and annual instalments of interest that would ***supplement*** their primary sources of income from other means. In these circumstances, we do not perceive the sort of powerlessness and helpless resignation that earmarked the *Semiahmoo* case or the surrenders considered in our earlier inquiries for the Kahkewistahaw and Moosomin First Nations. Nor do we see the persistent efforts to secure a surrender, or any indication that pressure on the Band would continue unabated until a surrender was secured, that characterized the earlier inquiries before the Commission.

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[572] *Semiahmoo Indian Band v. Canada*, [1998] 1 FC 3, 148 DLR (4th) 523 at 537-39 (CA).

The record also demonstrates that the issue of surrender was discussed with the Duncan's Band on a number of occasions before the 1928 surrender meeting. Notwithstanding the various locations at which band members resided, they appear to have had opportunities to discuss the issue among themselves, as Murison's report of them having done so and being "prepared" for him attests.

In addition, we have already alluded to our finding that, although the First Nation argued that the surrender was initiated by Canada's representatives, the evidence does not definitively support that conclusion. We also harken back to Angela Testawits's evidence that, after Murison advised the band members that he could not tell them the price the land would fetch prior to the public auction, he asked them, "What do you want to do?" In our view, this simple statement dramatically emphasizes the conclusion that Canada, far from usurping the Band's autonomy, actually sought the Band's decision on whether it wanted to surrender. We have also referred to other examples of Canada's non-committal approach to the surrender and its inquiries regarding the terms the Band would be prepared to accept, none of which suggests that the Crown sought to impose its will on the Band. In contrast to the *Semiahmoo* case and the Kahkewistahaw and Moosomin inquiries, we find nothing in Canada's motives and methods in securing the surrender that were deserving of reproach, other than perhaps marginal record-keeping. We therefore conclude that the Duncan's Band did not cede or abnegate its decision-making power regarding the surrender to or in favour of the Crown.

Duty of the Crown to Prevent the Surrender

The next question that the Commission must address is whether, on the facts of this case, the fiduciary obligation grafted by the Supreme Court of Canada onto subsection 51(4) of the 1927 *Indian Act* required the Crown to prevent the surrender of the reserve.

In *Apsassin*, the Beaver Indian Band had argued that the paternalistic scheme of the *Indian Act*, which vests title in the Crown on behalf of a band, imposed a duty on the Crown to protect Indians from making foolish decisions with respect to the alienation of their land. In essence, the argument was that the Crown should not have allowed the Beaver Indian Band to surrender its reserve because this was not in the Band's long-term best interests. Conversely, the Crown asserted that bands should be treated as independent agents with respect to their lands. McLachlin J dealt with the issue in these terms:

> The first real issue is whether the *Indian Act* imposed a duty on the Crown to refuse the Band's surrender of its reserve. The answer to this is found in *Guerin* v. *The Queen* ... where the majority of this Court, *per* Dickson J. (as he then was), held that the duty on the Crown with respect to surrender of Indian lands was founded on preventing exploitative bargains....
>
> *My view is that the* Indian Act*'s provisions for surrender of band reserves strikes a balance between the two extremes of autonomy and protection.* The band's consent was required to surrender its reserve. Without that consent the reserve could not be sold. But the Crown, through the Governor in Council, was also required to consent to the surrender. *The purpose of the requirement of Crown consent was not to substitute the Crown's decision for that of the band, but to prevent exploitation.* As Dickson J. characterized it in *Guerin* [p. 136 CNLR]:
>
> > The purpose of this surrender requirement is clearly to interpose the Crown between the Indians and prospective purchasers or lessees of their land, so as to prevent the Indians from being exploited.
>
> *It follows that under the Indian Act, the Band had the right to decide whether to surrender the reserve, and its decision was to be respected. At the same time, if the Band's decision was foolish or improvident – a decision that constituted exploitation – the Crown could refuse to consent. In short, the Crown's obligation was limited to preventing exploitative bargains....*
>
> The measure of control which the Act permitted the Band to exercise over the surrender of the reserve negates the contention that *absent exploitation*, the Act imposed a fiduciary obligation on the Crown with respect to the surrender of the reserve.[573]

Gonthier J concurred that "the law treats Aboriginal peoples as autonomous actors with respect to the acquisition and surrender of their lands, and for this reason, their decisions must be respected and honoured."[574]

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[573] *Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)* (1995), [1995] 4 SCR 344 at 370-71, [1996] 2 CNLR 25, 130 DLR (4th) 193, McLachlin J. Emphasis added.

[574] *Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)* (1995), [1995] 4 SCR 344 at 358, [1996] 2 CNLR 25, 130 DLR (4th) 193, Gonthier J.

On the facts in *Apsassin*, Addy J had found that the decision to surrender the reserve made good sense when viewed from the perspective of the Beaver Indian Band at the time of the surrender. McLachlin J agreed, concluding that the Governor in Council was not obliged to withhold consent because the evidence did not establish that the surrender was "foolish, improvident or amounted to exploitation." The question now before the Commission is whether the 1928 surrender by the Duncan's Band was so foolish, improvident, and exploitative as to give rise to a duty on Canada's part under section 51(4) of the 1927 *Indian Act* to withhold its own consent to the surrender.

The First Nation submits that the Crown's duty in such circumstances entails close scrutiny of the transaction to confirm that it is not exploitative and to ensure that the band giving the surrender has consented knowledgeably, freely, and without compulsion from outside pressures, including the ulterior motives of the Crown.[575] As counsel phrased it:

> As an exploitative bargain, that has a number of ramifications and that must be considered in light of the future interests and the future generations, not just is it okay from a commercial point of view. Are they getting too little? That's a completely irrelevant consideration, because the land is always available on the market. Is it a bad deal for the Band in light of their circumstances, in light of their needs, in light of their long-term best interests, in light of the fact they can never have a reserve again if they give it up, that they will lose all tax advantages, that they will lose a homeland and an economic base?[576]

Based on the reasons of the Federal Court of Appeal in *Semiahmoo*, the First Nation contends that the Crown is subject to a strict standard of conduct in assessing whether a given surrender is exploitative. To use the words of Isaac CJ, "[e]ven if the land at issue is required for a public purpose, the Crown cannot discharge its fiduciary obligation simply by convincing the Band to accept the surrender, and then using this consent to relieve itself of the responsibility to scrutinize the transaction."[577] According to counsel, the Crown did not undertake the required level of scrutiny in this case and failed to protect the Band's interests by allowing the surrender.[578]

The First Nation further contends that the 1928 surrender was exploitative because the Crown, in advising the Band and later assenting to the surrender, failed to consider leasing or other options to an absolute surrender. Counsel points to the efforts of neighbouring farmer J.B. Early to obtain a lease of IR 151E, which had fallen into disuse and disrepair, and which Early reported that band members had refused to sell. It will be recalled that, shortly before Early's letter, farmer A.C. Wright had inadvertently constructed his house and other improvements on IR 151G, and the Crown proposed to resolve the problem by obtaining a surrender of IR 151G. When these instructions were conveyed to Agent Laird, he recommended obtaining surrenders of IR 151B, 151C, 151D, 151E, 151F, 151H, and 151K as well, since "[t]here has been no work done on any of them for a considerable number of years, and if they are surrendered the Indians will still have ample land remaining in Reserves 151 and 151A., which contain 3,520 and 5,120 acres respectively of good farming land."[579] Accordingly, the Crown informed Early that it was seeking a surrender of IR 151E and, if it was obtained, his application would be considered and he would be informed of the result.

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[575] Written Submission on Behalf of the Duncan's First Nation, November 12, 1997, p. 64.

[576] ICC Transcript, November 25, 1997, pp. 119-20 (Jerome Slavik).

[577] *Semiahmoo Indian Band v. Canada*, [1998] 1 FC 3, 148 DLR (4th) 523 at 538-39 (CA)

[578] ICC Transcript, November 25, 1997, p. 120 (Jerome Slavik).

The First Nation contends that, despite Early's interest, "the Crown did not seriously consider the option of leasing land to Early ... [and] did not appear [to] conduct inquiries or feasibility studies for the purpose of informing themselves as to whether other Reserve holdings which were otherwise unused could be profitably leased to local farmers"; moreover, "[t]he historical record yields no evidence that any option but the sale of reserve land was ever presented or discussed with the members of Duncan's."[580] In the First Nation's view, although leasing was a "practice and policy" of the Department of Indian Affairs in the years preceding the surrender,[581] it was rejected by the Crown in the Duncan's case in favour of surrender for sale.[582] Counsel submits that, as a result, the Band lost the potential benefits of leasing in addition to losing its land:

> The Band did not have any knowledge or capacity to farm the land, but the land was amongst the best farm land in the area. It would have clearly been leasable and available to lease. Normally a leasing arrangement in that time gave three years free rent if there was breaking to do, and then a graduated rent after that. It was a way of having the land cleared and broken without losing ownership, and when the land was not being used. Yet it preserved the land and in fact enhanced the value of the land

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[579] Harold Laird, Acting Indian Agent, to the Assistant Deputy and Secretary, DIA, January 23, 1923, DIAND file 777/30-8, vol. 1 (ICC Documents, p. 150).

[580] Written Submission on Behalf of the Duncan's First Nation, November 12, 1997, p. 12; ICC Transcript, November 25, 1997, pp. 24-25 (Jerome Slavik).

[581] ICC Transcript, November 25, 1997, p. 19 (Jerome Slavik).

[582] ICC Transcript, November 25, 1997, p. 22 (Jerome Slavik).

> for the potential future use by Band members when they had their capacity, resources and manpower to farm the land.
>
> Reserve land, once it is sold and surrendered, cannot be recovered. It is a one-time asset. Once gone, it can never be recovered. Leasing was clearly an option here. It was known to the Department. Graham makes reference to it. It was never raised.[583]

Counsel later suggests why, in his view, the leasing option was not taken up with the Band:

> But I think the Crown itself had an interest in disposing of these reserve lands. Smaller Indian lands for the Crowns [sic] to administer was important. It would also allow them to use the proceeds of sale to offset economic and maintenance costs that may have to be provided to the community. They also intended to use the money to enable the Band to acquire or provide to the Band provisions that were owed to it under treaty.[584]

The inference that we take from these submissions is that the Crown's failure to consider or discuss leasing constituted exploitation, and Canada therefore breached a fiduciary obligation to the Duncan's Band by failing to withhold its assent to the surrender.

In response to these submissions, Canada takes the position that its role is not one of substituting its decision for that of a band, since bands have autonomy and can make their own decisions; rather, its function is to interpose itself between the Indians and prospective purchasers or lessees of the land to prevent the Indians from being exploited.[585] Canada then argues, based on Justice McLachlin's reasons in *Apsassin*, that "[t]he determination of whether a surrender was foolish, improvident or exploitative must be made within the context of the circumstances existing at the time of the surrender and must be based upon what could have been reasonably anticipated given the information available at that time."[586] In this case, counsel submits that, based on the information available in 1928, the surrender was not foolish, improvident, or exploitative, and Canada did not manipulate or take unfair advantage of the Duncan's Band; accordingly, the Crown was not obliged to withhold its consent to the surrender.[587] As Director General

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[583] ICC Transcript, November 25, 1997, pp. 25-26 (Jerome Slavik).

[584] ICC Transcript, November 25, 1997, p. 114 (Jerome Slavik).

[585] ICC Transcript, November 26, 1997, pp. 185-86 (Perry Robinson).

[586] Written Submission on Behalf of the Government of Canada, November 17, 1997, p. 28.

[587] Written Submission on Behalf of the Government of Canada, November 17, 1997, p. 28; ICC Transcript, November 26, 1997, p. 186 (Perry Robinson).

Michel Roy of the Specific Claims Branch wrote in the months leading up to the oral submissions in this inquiry:

> The evidence indicates that consideration was given to the Band's interests in proceeding with the surrender of the reserves. The matter of obtaining a surrender of the reserves appears to have been discussed in 1925 when it was observed that the reserves had been unoccupied for many years. At that time, Acting Assistant Deputy and Secretary Mackenzie was not disposed to proceed with a surrender and sale of Reserve 151 given that the current land values in the district were very low. As well, Inspector Murison's report on the surrender of the reserves noted that the Band was a small one and they appeared to be decreasing. He also noted that the Band had not been making use of the surrendered reserves and that the availability of water, hay and farming lands on Reserve 151A made it a "much more desirable reserve" than the surrendered lands. Murison also noted that members of [the] Band had expressed a desire to settle down on their reserve and start farming and that the surrender provided for the purchase of necessary equipment from the sale proceeds. It is Canada's position that the Band has not established that the surrender was foolish, improvident or exploitative.[588]

Generally speaking, the evidence in this case does not support the conclusion that Canada's actions were inspired by the same motives that characterized the surrenders considered by us in the Kahkewistahaw and Moosomin inquiries. In those cases, it was clear that the interests of the Indians were given scant regard, with the Kahkewistahaw people losing the lion's share of their good land and the members of the Moosomin Band being relocated to a reserve that was largely useless for agricultural purposes. By way of contrast, the comments of Crown representatives regarding the Duncan's surrender demonstrate that the Band would be retaining the land – IR 151A – "which the Indians would in any case desire to retain as their common reserve"[589] and which would likely satisfy their agricultural needs for the foreseeable future.[590]

For example, in January 1923, on recommending the surrender of the Band's eight smaller reserves in the wake of the inadvertent encroachment on IR 151G by A.C. Wright, Laird commented that "the Indians will still have ample land remaining in Reserves 151 and 151A., which contain 3,520 and

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[588] Michel Roy, Director General, Specific Claims Branch, Indian and Northern Affairs Canada, to Donald Testawich, Chief, Duncan's First Nation, and Jerome Slavik, Ackroyd, Piasta, Roth & Day, January 31, 1997 (ICC Exhibit 11, p. 6).

[589] D.C. Scott, DSGIA, to SGIA, December 29, 1927, DIAND file 777/30-8, vol. 1 (ICC Documents, pp. 189-91).

[590] As Neil Reddekopp observed, "Fairly early, IR 151A became the most important reserve to [the] Duncan's Band": G.N. Reddekopp, "The Creation and Surrender of the Beaver and Duncan's Band's Reserves," p. 60 (ICC Exhibit 5).

5,120 acres respectively of good farming land."[591] It is true that, at that time, it was contemplated that the Band would be retaining IR 151 as well as IR 151A, but when IR 151 was later included among the parcels to be surrendered, Canada's representatives still believed that IR 151A would adequately meet the Band's needs. As J.C. Caldwell noted in a postscript to his letter of July 14, 1928:

> I have omitted to explain that from Agent Laird's letter of October 21st last, it appears that it is the intention of the present owners of Reserve 151 to 151K to move to and reside on Reserve No. 151A, which contains something over five thousand acres. You will see, therefore, that the surrender of the Reserve mentioned and dealt with in this letter does not mean that the Indians will be without a suitable place of residence.[592]

Murison's report of October 3, 1928, following the surrender explicitly demonstrates that Canada's representatives turned their attention to the Band's interests:

> *This is a small band and they appear to be decreasing. They have not been making use of the lands which they have surrendered....*
>
> This band are retaining Reserve No. 151A which comprises 5120 acres. I would say that at least 35% is open farming land and the balance is covered with a medium sized growth of poplar with open spaces here and there. There is a small lake called Old Wives Lake, with a creek running along at the south end of the reserve, as well as a spring, where water can be obtained. There are also some hay lands on the border of Old Wives Lake. *This makes it a much more desirable reserve for Indians than the land which they have agreed to release*. The village of Brownvale is situated about two miles from the north west corner of this reserve.
>
> *It will be seen from the foregoing that ample provision has been made for this small band in retaining Reserve No. 151A, and after going carefully into the whole situation, it appears to me that it would be in their best interests if the Government can see fit to accept the surrender as it stands. The members of this band, in the past, have earned their living by hunting and working out for settlers and they have had no fixed place of abode*. Some of them expressed a desire to settle down on their reserve and start farming, hence the request that provision be made to supply equipment for them.[593]

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[591] H. Laird, Acting Indian Agent, to the Assistant Deputy and Secretary, DIA, January 23, 1923, DIAND file 777/30-8, vol. 1 (ICC Documents, p. 150).

[592] J.C. Caldwell, In Charge, Land and Timber Branch, DIA, to W.M. Graham, Indian Commissioner, July 14, 1928 (ICC Documents, pp. 210-12).

[593] W. Murison, Inspector of Indian Agencies, to W.M. Graham, Indian Commissioner, October 3, 1928, NA, RG 10, vol. 7544, file 29131-5, pt 1 (ICC Documents, pp. 254-55). Emphasis added.

In forwarding Murison's report to Scott, Graham commented: "You will note what the Inspector says regarding Reserve 151A, which the Indians have retained for their own use, and which seems to be ample for their requirements."[594] All of these statements suggest that IR 151A was both desired by the Band for its reserve and sufficient to meet the Band's requirements.

The First Nation also suggested that Canada, while making "ample" provision for the Indians in their then-current condition, lacked foresight and failed to provide for the Band's future – in other words, consented to an improvident surrender. Based on the conclusions of Isaac CJ in *Semiahmoo*, the First Nation may be correct in venturing that it would have been more prudent for the Band to lease out its land base rather than surrender it for sale. In this way the Band would allow area farmers to break the land and improve it so that it would be of greater utility to Band members should they eventually turn their attentions from hunting to farming.

We note that Isaac CJ agreed with the following finding by Reed J at trial that the Crown's fiduciary obligations require it, in cases involving surrender, to minimize the effect of the surrender on the band:

> When land is taken in this way and it is not known what, if any, use will be made of it, or whether the land is going to be used for government purposes, I think there is an obligation on the fiduciary to condition the taking by a reversionary provision, or ensure by some other mechanism that the least possible impairment of the plaintiffs' rights occurs. I am persuaded there was a breach of the fiduciary duty owed to the plaintiffs....[595]

Isaac CJ further agreed with Justice Reed's conclusion regarding breach, and continued:

> In my view, the 1951 surrender agreement, assessed in the context of the specific relationship between the parties, was an exploitative bargain. There was no attempt made in drafting its terms to minimize the impairment of the Band's rights, and therefore, the respondent [Crown] should have exercised its discretion to withhold its consent to the surrender or to ensure that the surrender was qualified or conditional.
>
> The Trial Judge found that, in 1951, the respondent did not have any definite plans for the construction of an expanded customs facility in the foreseeable future which necessitated the taking of 22.408 acres of the Band's reserve land. In fact, for over 40 years, no development plan was prepared for the Surrendered Land. It was only after

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[594] W.M. Graham, Indian Commissioner, to D.C. Scott, DSGIA, October 6, 1928, NA, RG 10, vol. 7544, file 29131-5, pt 2 (ICC Documents, pp. 263-65).

[595] *Semiahmoo Indian Band v. Canada*, [1998] 1 FC 3, 148 DLR (4th) 523 at 537 (CA).

this litigation was commenced that the respondent commissioned a study that did recommend redevelopment of the Douglas Border Crossing. The report for this study was not received until 1992....

The bargain, in other words, was exploitative. For this reason, the respondent should not have consented to the absolute surrender, at least not without first ensuring that it contained appropriate safeguards, such as a reversionary clause, to ensure the least possible impairment of the Band's rights.

I should emphasize that the Crown's fiduciary obligation is to *withhold its own consent* to surrender where the transaction is exploitative. In order to fulfil this obligation, the Crown itself is obliged to scrutinize the proposed transaction to ensure that it is not an exploitative bargain. As a fiduciary, the Crown must be held to a strict standard of conduct. Even if the land at issue is required for a public purpose, the Crown cannot discharge its fiduciary obligation simply by convincing the Band to accept the surrender, and then using this consent to relieve itself of the responsibility to scrutinize the transaction. The Trial Judge's findings of fact, however, suggest that this is precisely what the respondent did....

The fact that the Trial Judge did not view the $550.00 per acre received by the Band for the surrendered land as "below market value" does not negate the possibility of a breach of fiduciary duty. The focus in determining whether or not the respondent breached its fiduciary duty must be on the extent to which the respondent protected the best interests of the Band while also acknowledging the Crown's obligation to advance a legitimate public purpose. In this case, the Band did not want to surrender the land at all but felt it had no choice. The respondent consented to an absolute surrender agreement in order to take control of much more land than they in fact required, and they did so without any properly formulated public purpose. For these reasons, I find that the respondent did breach its fiduciary duty to the Band in the 1951 surrender even though the Band may have received compensation for the Surrendered Land somewhere in the neighbourhood of market value.

The Band had to, and did, rely upon the respondent's representations to the effect that the land was required for customs facilities, thereby implying that an absolute surrender was necessary and that the interests of the Band were being safeguarded as much as possible. While it is true that the express wording of the surrender instrument does not indicate that the land was being acquired for the purpose of a customs facility, a court should not confine its analysis so narrowly. The "oral terms" of a surrender are part of the backdrop of the circumstances that determine whether the Crown has acted unconscionably. As stated by Dickson J. in *Guerin*, they serve to "inform and confine the field of discretion within which the Crown was free to act."

On the basis of the foregoing, I find that the Trial Judge did not err in concluding that the Crown breached its fiduciary duty when it consented to the 1951 surrender. The spectre of expropriation clearly had a negative impact on the ability of the Band to protect their own interests in the "negotiations" which ultimately led to the surrender. While the Crown must be given some latitude in its land-use planning when it actively seeks the surrender of Indian land for a public purpose, the Crown must ensure that it impairs the rights of the affected Indian Band as little as possible, which includes ensuring that the surrender is for a *timely* public purpose. In these circumstances, the Crown had a clear duty to protect the Band from an exploitative bargain

> by refusing to consent to an absolute surrender which involved the taking of reserve land for which there lacked a foreseeable public need.[596]

Among the factors to which Isaac CJ referred in concluding that the Crown had breached its fiduciary responsibilities to the Semiahmoo Band were the following:

- the Crown's failure to protect the Band's interests, as evident in the Crown's negotiation of the surrender without any timely public purpose and its failure to qualify or condition the surrender terms to minimize the impairment of the Band's rights;
- the Crown's reliance on the Band's "encouraged (required)" consent as the basis for relieving the Crown of its responsibilities to scrutinize the transaction and to withhold consent for a clearly exploitative transaction;
- the Band's sense of "powerlessness" in the decision-making process in light of its knowledge that the Crown could expropriate should the Band refuse to surrender;
- the Band's reliance on the Crown's oral representations regarding the purpose and necessity of the surrender to safeguard the Band's interests in the transaction; and
- the insignificance of the fact that the price paid to the Band was market value or close to it in assessing whether a fiduciary obligation was breached.

There is no doubt that, in the present case, the Crown, in taking an absolute surrender of IR 151 and IR 151B through IR 151G, did not qualify or condition the surrender to minimize the impairment of the Band's rights. However, for reasons already expressed, we do not agree that the Crown sought to relieve itself of the obligation to scrutinize the transaction by relying on the Band's consent. Nor do we see any indication that Canada suggested that the surrendered lands would be used for any purposes other than those to which they were eventually put – sale and settlement – or that the Band relied on any misrepresentations by the Crown regarding the purpose and necessity of the surrender.

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[596] *Semiahmoo Indian Band v. Canada*, [1998] 1 FC 3, 148 DLR (4th) 523 at 537-40 (CA).

Ultimately, this transaction must be judged, as Canada has argued, from the perspective of what appeared to be in the Band's best interests *at the time*. The First Nation has attacked the surrender on the basis that, by consenting to a surrender for sale rather than lease, the Crown failed to minimize the impairment of the Band's rights regarding its reserve lands. With the benefit of hindsight, and in the context of the 1990s, that may be so. However, it must be remembered that *Semiahmoo* dealt with a surrender that took place in 1951, by which time significant changes in the views of how best to serve the Indians' best interests had taken place. Moreover, the *Semiahmoo* surrender was exploitative because, in the words of Isaac CJ, it "involved the taking of reserve land for which there lacked a foreseeable public need." By way of contrast, the Duncan's surrender occurred in 1928, when, based on the evidence before the Commission, it was perceived to be in the public interest to encourage the settlement and development of western Canada. Just as significantly, the Department of Indian Affairs at that time considered the surrender of reserves for sale – and investing the proceeds in a trust account, with annual payments of interest to the Band – an appropriate means of acting in the Indians' best interests.

In a paper prepared in November 1986 for the *Apsassin* trial,[597] J. Edward Chamberlin commented on the evolution of Crown policy with regard to the disposition of interests in Indian reserves following the turn of the 20th century. He noted a preference in the early years for surrenders, ostensibly "to encourage more rapid assimilation of the Indian population," but, in his view, actually driven by "the pressures of white settlement."[598] In response to these increasing pressures, the *Indian Act* was amended in 1906 to increase the permitted distribution of sale proceeds to the surrendering band from 10 per cent to 50 per cent in the hope that this would "encourage more surrenders ... improve the financial situation of the lands, and lessen the burden on government."[599] Chamberlin continued:

> Pressures for access to reserve lands continued to build, despite the 1906 amendments, and in 1911, amendments to the Indian Act dramatically extended powers for expropriation of reserve lands for public purposes, and enabled the federal government to alienate reserve lands adjoining municipalities without band consent; but

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[597] J. Edward Chamberlin, "Evidence of J.E. Chamberlin Re: Apsassin et al v. the Queen," November 13, 1986 (ICC Exhibit 12, tab A).

[598] J. Edward Chamberlin, "Evidence of J.E. Chamberlin Re: Apsassin et al v. the Queen," November 13, 1986, p. 24 (ICC Exhibit 12, tab A).

[599] J. Edward Chamberlin, "Evidence of J.E. Chamberlin Re: Apsassin et al v. the Queen," November 13, 1986, p. 25 (ICC Exhibit 12, tab A).

even so, and even while it was obvious that there was capitulation to non-native interests, the appeal of the government was to the British and Canadian principles of responsible guardianship of Indian interests.

A proposed amendment in 1914 to extend this provision for unilateral action even further was turned down, after strenuous debate, when it reached the Senate.

Duncan Campbell Scott superintended the introduction of the 'Great Production Campaign' in 1918, as a contribution to the war effort. The object was to bring as much reserve land as possible into production, especially on the western plains; and in order to facilitate this an amendment to the Indian Act was passed, and Inspector W.M. Graham in Regina was put in charge. The amendment allowed the Superintendent General to lease uncultivated reserve lands without a surrender. Explaining this provision, Superintendent General Arthur Meighen said that

> the Indian Reserves of Western Canada embrace very large areas far in excess of what they are utilizing now for productive purposes.... We want to be able to use that land in every case; but of course, the policy of the department will be to get the consent of the band wherever possible ... in such spirit and with such methods as will not alienate their sympathies from their guardian, the Government of Canada....
>
> We would be only too glad to have the Indian use this land if he would; production by him would be just as valuable as production by anybody else. But he will not cultivate this land, and we want to cultivate it; that is all. We shall not use it any longer than he shows a disinclination to cultivate the land himself.

This move was undertaken in the urgency of the moment by Robert Borden's government, and did in some cases include initiatives to take surrenders of parts of reserves for sale as well as for lease. But it should not be interpreted as anything like the kind of deliberate policy to alienate reserve lands that informed the general allotment policy in the United States....

The 1918 amendment giving the government authority to lease land for agricultural purposes without the consent of the band was significant in that while it increased the flexibility of the Department in responding to non-native interests, it also increased the burden of responsibility on the Department to act in a manner that was in the Indians' best interests. The 1914 amendment, if it had passed, would have brought into play public scrutiny of Departmental action in selling Indian lands against the owner's wishes; while the 1918 provision for unilateral decisions regarding leasing kept the matter within the Department.

By the mid-1930s, the development of reserves and the maintaining of these lands for future Indian needs became increasingly recognized as the key to Indian advancement, and the protection of reserve lands was consistently and continuously reiterated as government policy. Even during the period when surrenders for sale were being encouraged, the Department's responsibility to act in the Indian's interest by ensuring the best possible terms was routinely emphasized. In particular, Deputy Superintendent General Duncan Campbell Scott had a very firm sense of the responsibilities of the Department in any sales of Indian land. In a letter

> written in 1918 to the Great War Veterans Association, Scott conveyed the views of the Superintendent General on
>
>> the question of utilizing the Indian Reserves for the purpose of soldiers' settlement.... He wishes me to point out that it is not possible to allow homesteading on Indian Reserves and that the first obligation of the Department, after Indian land is surrendered for sale, is to sell it to the best possible advantage in the interests of the Indians. To act otherwise would be a breach of trust, as the reserves were allotted to the Indians as part of their compensation for their abandonment of aboriginal rights over larger territories. The necessity of obtaining the full value of Indian lands makes it difficult to deal with such properties under the Soldiers' Settlement Act and the regulations governing the Board.
>
> *Indeed, following a run of surrenders, it became apparent that selling land to provide a capital base for Indian economic advancement did not work in the long-term interest of the Indians*. The point was grimly confirmed in the Meriam Report in 1928, which demonstrated beyond question the appalling consequences for the Indians of the dispersal of lands out of Indian ownership in the United States since 1887, when the General Allotment Act was passed.[600]

From this passage it can be seen that the leasing initiative in 1918 represented a response to the demands for increased production during the war years, but the primary policy appeared to remain the surrender for sale until at least the late 1920s and perhaps the mid-1930s. Chamberlin went on to discuss a conference jointly sponsored by the University of Toronto and Yale University in 1939 at which Canadian and American officials evaluated and rejected the policy of surrender for sale, "concluding that it was not in the best interest of the Indian people to separate them from their reserve lands."[601]

However, in 1928, it appears that Crown officials still considered that surrendering for sale, and investing the proceeds in an interest-bearing trust account, was a prudent course of conduct in attending to the interests of aboriginal peoples. Although such actions might have been considered misguided as little as 10 years later, and might today be viewed with disdain for failing to minimize the impairment of the Band's rights, we see nothing in those actions *at that time* to suggest that the Crown was acting other than honestly and in what it perceived to be the Band's best interests.

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[600] J. Edward Chamberlin, "Evidence of J.E. Chamberlin Re: Apsassin et al v. the Queen," November 13, 1986, pp. 25-27 (ICC Exhibit 12, tab A). Emphasis added.

[601] J. Edward Chamberlin, "Evidence of J.E. Chamberlin Re: Apsassin et al v. the Queen," November 13, 1986, p. 27 (ICC Exhibit 12, tab A).

There was also a property management issue. Since most of the reserves were unoccupied and unused by Band members, and since the Crown's presence in the area was typically limited to annual visits by the Indian Agent to pay annuities, there would rarely be anyone in the vicinity to supervise a lessee to ensure that the lands were being used in a proper and husbandlike manner. As Graham noted in a 1922 memorandum to Scott with regard to a request by farmer A.D. Madden to make reserve lands on the Beaver Band's IR 152 available under lease for pasturing cattle:

> In the past no land has been leased by the Department in that part of the country, and it is for the Department to decide whether it would be a wise plan to do so now. In my opinion to do so would be unwise as we have no organization in that district by which lessees could be controlled.[602]

Eventually the Crown, over Graham's objections, did express a willingness to discuss leasing with the Beaver Band, but nothing came of those discussions. Assuming, as the Crown apparently did in the mid-1920s, that surrendering for sale, with the sale proceeds invested for the benefit of the Indians, was an equally attractive alternative to surrendering for lease, it presumably made sense – at least in circumstances where property management would be an issue – to convey the fee simple interest rather than a mere tenancy, since the recipient farmer was more likely to manage the property properly if he could call it his own. In retrospect, the Crown's assumption that surrender for sale was a viable option may now appear to have been an error in judgment, but, as we have already stated, it appears to have been honestly made and with the best interests of the Band in mind.

For these reasons, and given that the Duncan's Band was evidently not using the lands surrendered and would be left with a reserve that appeared to satisfy its needs, we conclude that the 1928 surrender for sale, with the sale proceeds intended to be invested for the benefit of the Band, cannot be considered to have been exploitative in the context of the time.

There is one significant caveat to this conclusion, however, and that is with respect to IR 151E. It will be recalled that, on January 12, 1923, J.B. Early approached the Crown with a proposal to lease the 118.7-acre IR 151E. Early offered to pay $2.00 per acre annually for the 75 acres that had previously been plowed and, after five years' free use of land "cleared and broken up by me," to pay $2.00 per acre for that land as well. Early also offered to pay 10 cents per acre for pasture land. He renewed this proposal through his Member of Parliament, D.M. Kennedy, on April 10, 1923. We see no evidence that Early's proposal was ever presented to the Band as an option for its consideration, notwithstanding Early's statement that he had the "consent of resident and remaining 'Breeds'" to rent the land.

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[602] W.M. Graham, Indian Commissioner, to Duncan C. Scott, DSGIA, May 12, 1922, NA, RG 10, vol. 7544, file 29131-9, pt 1 (ICC Exhibit 15, vol. 2).

Although it might be possible for the Commission to undertake a detailed comparison of the relative advantages and disadvantages of the lease proposed by Early and the terms of the ultimate sale of IR 151E, we do not believe that it is necessary to do so. Leasing clearly presented a viable option to surrender for sale, and subsequent events suggest that Canada later came to the conclusion that leasing was generally the *better* of the two alternatives. Given that leasing would have provided band members with a steady revenue stream and would have allowed them to retain their interest in the reserve, it seems evident that they should have been given the opportunity to consider Early's proposal. Nor does it appear that Canada's representatives gave Early's leasing initiative much thought.

In the Commission's view, Canada was under a positive duty to present the offer to the Band so that band members might weigh and choose between the alternatives before them. Canada failed to fulfil that duty. In these circumstances, the Governor in Council should have withheld consent to the surrender of IR 151E since, without the Band having been afforded the opportunity to consider its options, the surrender must be considered to have been foolish, improvident, and exploitative. We conclude that the Crown breached its fiduciary obligations to the Duncan's Band with respect to the surrender of IR 151E, and accordingly Canada owes the First Nation an outstanding lawful obligation under the Specific Claims Policy.

Conclusion

The *Apsassin* and *Semiahmoo* decisions require us to review circumstances of the relationship between the Crown and a First Nation to determine whether, on the facts of a given case, a fiduciary obligation is owed by the Crown to the First Nation and whether such obligation, if found to exist, has been breached. In 1928, the Duncan's Band was a relatively small community, with many of its principal men earning their livelihood trapping and hunting. Few were involved in agriculture or used the Band's reserves to any great extent, or at all, for residential, commercial, or other purposes. The record reveals a pattern of local political pressure to open up the Band's reserves for settlement. The record also supports the view that the Crown sought to protect the Band's interests by not actively pursuing surrender, and in fact rejecting requests for surrender, until other available lands in the area had been taken up and the Band's reserves would attract a better price. There is also evidence before us that, prior to the surrender and in the course of the surrender meeting, the Crown consulted and negotiated with the Band regarding the surrender. Although details surrounding these consultations and negotiations are sketchy, we cannot engage in speculation or conjecture to conclude that the surrender was in some way improper. There was no evidence of bribery, fraud, or undue influence on the facts before us in this inquiry.

Nor does the record support the conclusion that the Duncan's First Nation was particularly or peculiarly vulnerable. In *Semiahmoo*, the court was faced with a fact situation where a Band was faced with either surrender or the threat of expropriation. Regardless of the Band's decision, the land would be lost, a fact that left the Band feeling powerless. Similar facts simply do not exist in the context of this inquiry. There is no evidence to suggest that members of the Duncan's Band were threatened or influenced by the Crown to sell their lands. The record, though rather meagre, supports the conclusion that the Crown properly discussed surrender with the Band and that the Band exercised its autonomy and control in surrendering its lands. With the exception of IR 151E, with respect to which we have concluded that Canada owes the First Nation an outstanding lawful obligation, we see no evidence that, in the context of 1928, the surrender of the remaining Duncan's reserves would have been considered improvident or foolish.

Finally, it will be recalled that, in our earlier discussion of Deputy Superintendent General Scott's instructions to his Indian agents, we noted that those instructions may constitute evidence regarding the standard of "due diligence" to which the Crown expected its representatives to adhere, and thus may be relevant in determining whether the Crown discharged its fiduciary duties to the Duncan's Band in obtaining the 1928 surrender. In closing, we see no marked and substantial departure from those instructions that would indicate a breach of fiduciary obligation in this case.

As a result, we conclude that the 1928 surrender of IR 151E constituted the sole breach of fiduciary obligation owing by the Crown to the Band. Accordingly, we recommend that Canada open negotiations with the First Nation with respect to this aspect of the claim only.

PART V

RECOMMENDATION

We have been asked to inquire into and report on whether the Government of Canada owes an outstanding lawful obligation to the Duncan's First Nation. We have concluded that it does, but only with respect to the surrender of IR 151E.

In the 1928 surrender of IR 151 and 151B through 151G, the requirements of section 51 of the 1927 *Indian Act* regarding surrender were satisfied, and it does not appear that the Crown breached any fiduciary obligations to the Band in the course of the surrender proceedings. Specifically, we see no evidence that the Band's understanding of the terms of the surrender was inadequate, that the conduct of the Crown tainted the dealings in a manner that would make it unsafe to rely on the Band's understanding and intention, that the Band ceded or abnegated its decision-making authority to or in favour of the Crown in relation to the surrender, or that the surrender was so foolish or improvident as to be considered exploitative. The sole exception to this conclusion is IR 151E, with respect to which the Crown breached its fiduciary obligations to the First Nation by failing to present J.B. Early's leasing proposal to the Band as an alternative to surrender for sale in 1928.

With regard to the First Nation's submissions based on the decision of the Federal Court of Appeal in *Semiahmoo*, we see nothing in the present case to suggest that the Duncan's Band felt powerless or that its discretion was fettered in the face of a threat like the "spectre of expropriation." Moreover, although Isaac CJ concluded that the Crown was obliged to ensure that the surrender was implemented in such a way as to cause the least possible impairment of the Band's rights, he reached this conclusion in the context of his decision that the Crown had a duty to protect the Band from an exploitative bargain by refusing to consent to an absolute surrender that involved the taking of reserve land for which there lacked a foreseeable public need. We find that, in this case, the surrender was for a valid public purpose, and, although perhaps it might be considered unwise from the perspective of hindsight, it was considered at the time to be a viable means of protecting the Band's interests. Nevertheless, the Crown breached its fiduciary obligation with regard to IR 151E, not because leasing may have been a viable option in a general sense, but because the Crown failed to present J.B. Early's specific leasing proposal to the Band for its consideration.

In conclusion, we therefore recommend to the parties:

That the claim of the Duncan's First Nation regarding the surrender of IR 151E be accepted for negotiation under the Specific Claims Policy.

FOR THE INDIAN CLAIMS COMMISSION

Daniel Bellegarde

Daniel J. Bellegarde
Commission Co-Chair

P.E. James Prentice, QC
Commission Co-Chair

Carole T. Corcoran
Commissioner

Roger Augustine

Roger J. Augustine
Commissioner

Dated this 10th day of September, 1999.

APPENDIX A

DUNCAN'S FIRST NATION INQUIRY – 1928 SURRENDER CLAIM

1 **Planning conferences** Ottawa, June 8, 1995
Ottawa, April 8, 1997

2 **Community session** Brownvale, Alberta, September 6, 1995

The Commission heard evidence from Duncan's First Nation elders Isadore Mooswah (Ted Knott) and John Testawits.

3 **Legal argument** Edmonton, November 25 and 26, 1997

4 **Content of formal record**

The formal record for the Duncan's First Nation 1928 Surrender Claim Inquiry consists of the following materials:

- the documentary record (3 volumes of documents, with annotated index) (Exhibit 1)
- Exhibits 2-15 tendered during the inquiry, including the transcript from the community session (1 volume)
- transcript of oral submissions (1 volume)
- written submissions of counsel for Canada and counsel for the Duncan's First Nation, including authorities submitted by counsel with their written submissions

The report of the Commission and letters of transmittal to the parties will complete the formal record of this inquiry.

INDIAN CLAIMS COMMISSION

LONG PLAIN FIRST NATION INQUIRY
LOSS OF USE CLAIM

PANEL

Commission Co-Chair P.E. James Prentice, QC
Commission Co-Chair Daniel J. Bellegarde
Commissioner Carole T. Corcoran

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To the Indian Claims Commission
David E. Osborn, QC / Thomas A. Gould

FEBRUARY 2000

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A Long Plain First Nation Loss of Use Inquiry 342

EXECUTIVE SUMMARY

On August 3, 1871, the Government of Canada and the Indians of southern Manitoba – including the Portage Band – entered into Treaty 1, the first of the numbered prairie treaties. That treaty entitled the members of the Portage Band to a tract of land for their use and benefit which was to be of sufficient size to provide the Band with 32 acres of land for each band member.

Treaty 1 was amended on June 20, 1876, when the Portage Band was divided into the Long Plain and Swan Lake Bands. Chief Short Bear of the Long Plain Band selected the site of the Long Plain reserve in July of that year, and Canada's surveyor, J. Lestock Reid, marked off sufficient land for 165 people under the treaty formula. Canada eventually formalized the setting apart of these lands by Order in Council 2876 on November 21, 1913.

It seems both unfortunate and incontrovertible that the acreage set aside by Canada in 1876 did not reflect the actual population of the Long Plain Band, which at that time appears to have constituted at least 223 people. The shortfall in the acreage of land set aside gave rise to a claim described in law as a treaty land entitlement shortfall claim.

On November 5, 1982, John Munro, at that time the Minister of Indian Affairs, accepted Long Plain's claim of an outstanding treaty land entitlement under the Government of Canada's Specific Claims Policy. With respect to the government's obligation to provide the shortfall lands, the parties eventually negotiated a Settlement Agreement dated August 3, 1994. That agreement provided the First Nation with funds totalling $16.5 million while still allowing the First Nation to advance a claim to the Indian Claims Commission with respect to compensation for "loss of use" of the shortfall acreage. For its part, Canada reserved in the Settlement Agreement the right to maintain that there was no shortfall.

A claim for loss of use encompasses those compensatory or restitutionary claims advanced by a band because its full entitlement of reserve land was not set aside "on time." In this case, Long Plain did not receive funds in compensation for the outstanding settlement lands until 118 years after the reserve was set aside. This loss of use claim seeks compensation for the fact that the First Nation did not have those additional acres – in effect, it lost the use of them – for that 118-year period.

The Commission has been asked to decide whether a band with an admitted shortfall in its treaty land entitlement is entitled to be compensated for its loss of use based upon the Specific Claims Policy. The Policy indicates that this question turns upon the issue of whether loss of use can be said to form part of Canada's outstanding "lawful obligation."

The Commission concludes in this report that a band such as Long Plain is indeed entitled to advance a compensation claim for its loss of use of a treaty land entitlement shortfall acreage. In our view, loss of use is compensable as part of Canada's outstanding lawful obligation. We base our conclusion upon the finding that Canada's failure to deliver the First Nation's entire land entitlement amounts to a ***breach of treaty***.

There is, in addition, a second, concurrent foundation for Canada's liability. Since Canada has failed to fulfill the trust-like responsibilities it owes to the First Nation in respect of matters concerning Indian title, it is also in ***breach of a fiduciary duty***. However, although it is our view that an enforceable cause of action in favour of Long Plain can be established on the basis of ***either*** breach of treaty or breach of fiduciary duty, we do not predicate our conclusion in this report upon the latter ground.

Moreover, we decline to decide whether Canada's conduct in this case substantiates a separate cause of action based upon breach of other fiduciary duties owed to the First Nation. We believe that it is unnecessary for us to decide this point because the essential cause of action – namely, breach of treaty – has already been made out. In addition, we are concerned that the limited evidentiary basis placed before us is inadequate for that purpose in any event.

We have also provided very clear direction to Long Plain and Canada with respect to what we believe to be the proper approach to the quantification of such a loss of use claim. We have concluded that a claim of this nature, whether characterized as a breach of treaty or a breach of fiduciary duty, gives rise to an equitable jurisdiction in the determination of compensation. Therefore, all the factors that would be relevant in such a case in a court of equity must be considered to arrive at a result that is just, equitable, and proportionate to the wrong suffered. In particular, a court may have full regard for the conduct of both Canada and the band within the appropriate historical context, but also to common law principles of foreseeability, remoteness, causation, and mitigation. Canada's state of knowledge relative to the existence of the claim is one relevant consideration. So, too, is any explanation that Canada may offer for its failure to respond to the claim at an earlier date. Obviously, the amount of land at issue, the economic value of that land, and the period of time during which the obligation remained outstanding are also very relevant. In our view, all these matters relate to the *quantification* of the First Nation's entitlement to compensation once it has been established that Canada is in breach of the terms of the treaty. Further characterizing Canada's conduct as a breach of fiduciary duty neither adds to, nor subtracts from, the remedies available in assessing compensation.

In conclusion, it is our recommendation that Canada accept and negotiate Long Plain's claim to be compensated for loss of use of the shortfall acreage. The Commission is certainly prepared to assist the parties in the determination of compensation, if requested.

PART I

INTRODUCTION

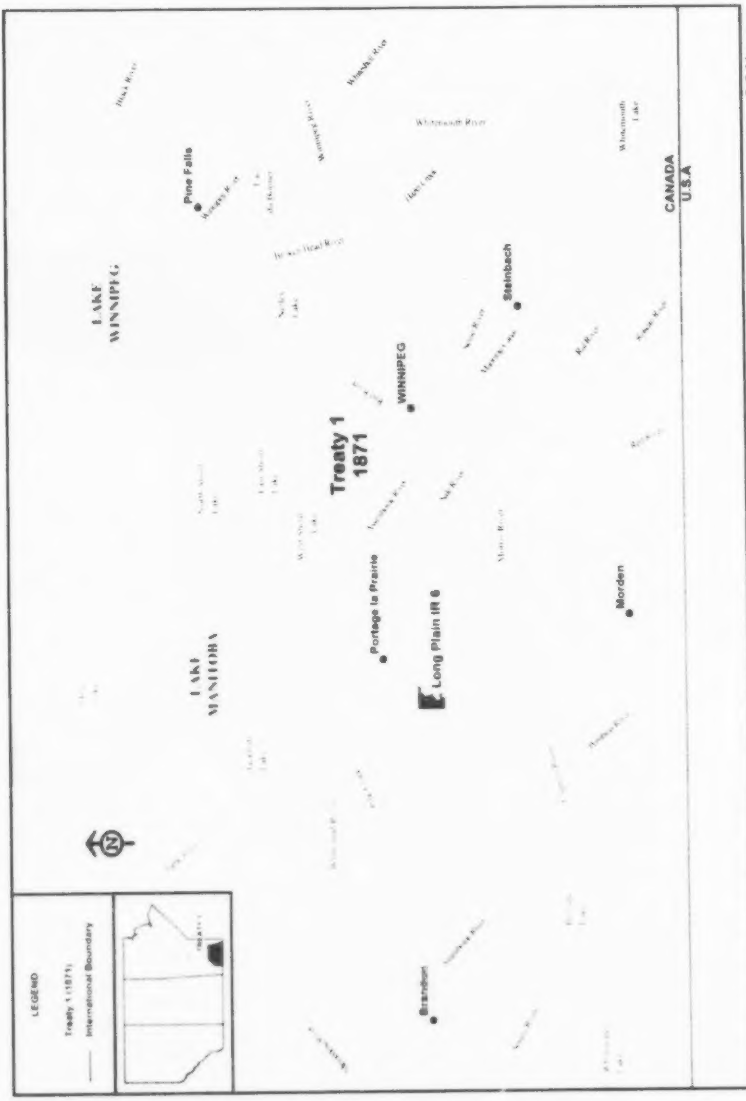
On August 3, 1871, the Government of Canada and the Indians of southern Manitoba – including the Portage Band, as represented by Chief Oo-za-we-kwun – entered into Treaty 1, the first of the numbered prairie treaties. That treaty entitled the members of the Portage Band to a tract of land for their use and benefit which was to be of sufficient size to provide the Band with 32 acres of land for each band member.

Treaty 1 was amended on June 20, 1876, when the Portage Band was divided into the Long Plain and Swan Lake Bands. Chief Short Bear of the Long Plain Band selected the site of the Long Plain reserve in July of that year, and Canada's surveyor, J. Lestock Reid, marked off sufficient land for 165 people under the treaty formula. Canada eventually formalized the setting apart of these lands by Order in Council 2876 on November 21, 1913. The location of the Long Plain Indian Reserve (IR) 6 is shown on map 1 (see page 277).

However, it appears that the acreage set aside by Canada in 1876 did not reflect the actual population of the Long Plain Band, which at that time seems to have constituted at least 223 people. On November 5, 1982, John Munro, at that time the Minister of Indian Affairs, accepted Long Plain's claim of an outstanding treaty land entitlement under the Government of Canada's Specific Claims Policy, and the Band and the government eventually negotiated a Settlement Agreement dated August 3, 1994.[1] That agreement provided funds in compensation for the shortfall acreage, but at the same time allowed the First Nation to advance a claim to the Commission with respect to compensation for loss of use of that acreage.

---

[1] Treaty Land Entitlement Settlement Agreement between Her Majesty the Queen, in right of Canada, as represented by the Minister of Indian Affairs and Northern Development, and the Long Plain Indian Band (also known as the Long Plain First Nation), as represented by its Chief and Councillors (hereafter the "Settlement Agreement"), August 3, 1994 (ICC Documents, pp. 519-696).


LAKE WINNIPEG
Pine Falls
Whitemouth River
Whitemouth Lake
CANADA
U.S.A
Steinbach
WINNIPEG
Treaty 1
1871
Portage la Prairie
Long Plain IR 6
Morden
LAKE MANITOBA
Brandon
LEGEND
Treaty 1 (1871)
International Boundary

Prepared by Public History Inc. Cartography by GIS Mapping

Map 1: Claim Area Map

The Commission has been asked to decide whether a band with an admitted shortfall in its treaty land entitlement is entitled to be compensated under the Specific Claims Policy for the band's loss of use of the shortfall. The question that must be decided in this inquiry is whether compensation for loss of use can be said to form part of Canada's outstanding "lawful obligation" under the Policy.

THE SETTLEMENT AGREEMENT AND BACKGROUND TO THE INQUIRY

The Settlement Agreement of August 3, 1994, between the Government of Canada and the Long Plain First Nation resolved Long Plain's outstanding claim to treaty land entitlement in consideration for cash payments totalling $16.5 million. In exchange, the First Nation provided a release which prevents it from commencing legal proceedings against Canada to claim more land under the provisions of Treaty 1. The First Nation did, however, retain the right to claim compensation for loss of use of its treaty land entitlement shortfall for the period from 1876 to the date of the Settlement Agreement. The subject matter of this report is whether Canada is liable in law for loss of use compensation and, if so, on what basis and in what amount.

Article 2 of the Settlement Agreement deals with the instalments to be paid to Long Plain:

> **ARTICLE 2: FEDERAL PAYMENT**
>
> 2.1 Subject to the terms of this Agreement, Canada shall provide the First Nation with a Federal Payment of $16,500,000.00, which payment, if and to the extent same comes due as hereafter provided, shall be made in two instalments.
>
> 2.2 *Within 30 days of this Agreement coming into force*, but subject to Article 14.2, *Canada shall provide the First Nation with the first instalment of the Federal Payment in the amount of $8,400,000.00.*
>
> 2.3 Subject to Article 14.2, *within 30 days of the claim of the First Nation for Loss of Use being*:
>
> (a) settled by the parties as provided for in Article 3.3; or
>
> (b) abandoned by the First Nation as provided for in Article 3.4; or
>
> (c) *rejected by Canada as provided for in Article 3.5*,
>
> *Canada shall provide the First Nation with the second instalment of the Federal Payment in the amount of $8,100,000.00* (subject to any reduction as a result of Manitoba contributing land suitable to the First Nation and Canada as

> part of this settlement to satisfy its obligations under paragraph 11 of Schedule 1 of the *Constitution Act, 1930*), provided that such second instalment of the Federal Payment shall not be payable to the First Nation by Canada:
>
> (d) before December 1, 1994; or
>
> (e) at all in the event the First Nation commences legal proceedings in a court of competent jurisdiction against Canada or Manitoba seeking damages or other relief in respect of a claim for Loss of Use provided the decision to commence such proceeding has been ratified by the Eligible Members in accordance with the ratification procedure set out in Schedule "B" (with such amendments as the circumstances may reasonably require).[2]

Article 2.3(c) provides that Canada would be compelled to make the second payment of $8.1 million to the First Nation within 30 days of Canada rejecting the First Nation's claim. Article 3 then deals generally with the process for addressing Long Plain's loss of use claim, and, in the context of Article 2.3(c), Article 3.5 is particularly relevant because it sets forth the circumstances in which Canada is deemed to have rejected the First Nation's claim:

> **ARTICLE 3: PROCESS FOR DEALING WITH ALLEGED LOSS OF USE**
>
> 3.1 The parties affirm that it is the intent and purpose of this Agreement to achieve a full and final settlement of the matter of the amount of land to be provided to the First Nation as provided for in the [Treaty 1] Per Capita Provision [of 160 acres per family of five, or in that proportion for larger or smaller families] and all other claims relating thereto, provided that the First Nation reserves the right to consider a potential claim for Loss of Use as herein provided.
>
> 3.2 The parties undertake and agree that any claim the First Nation wishes to advance for Loss of Use shall be advanced and addressed in the manner and within the timeframe set out in this Article.
>
> 3.3 (a) On or before December 1, 1994, the First Nation may submit its claim for Loss of Use to Canada, particularised in sufficient detail as to permit Canada to review such claim on its merits.
>
> (b) Canada shall, within six months of receipt of such submission of the First Nation, review same and advise the First Nation as to whether Canada is prepared to recognise a lawful obligation to compensate the First Nation for its claim for Loss of Use.

---

[2] Settlement Agreement, August 3, 1994 (ICC Documents, pp. 533-55). Emphasis added. Article 14.2 referred to in Article 2 is irrelevant to these proceedings, providing that, "[n]otwithstanding any other provision of this Agreement, any obligation on the part of Canada to make any payment to, on behalf of or for the benefit of the First Nation is subject to the appropriation of sufficient funds from Parliament." p. 559.

(c) In the event:

(i) Canada recognises a lawful obligation to compensate the First Nation for its claim for Loss of Use; or

(ii) Canada refuses to recognise such a lawful obligation, the First Nation submits such claim to the ICC [Indian Claims Commission] for the purpose of seeking a recommendation on the issue of whether such lawful obligation exists, the ICC recommends Canada proceed to recognise same, and Canada accepts such recommendation

the parties shall commence negotiations within 30 days thereafter to determine the quantum of the claim of the First Nation for Loss of Use.

(d) In the event Canada is prepared to recognise a lawful obligation to compensate the First Nation for its claim for Loss of Use and the parties are unable to reach consensus as to the quantum of such claim by:

(i) June 1, 1996; or

(ii) six months after the date the ICC renders its recommendation under Article 3.3(c)(ii),

whichever date shall last occur, the First Nation may submit such claim to the ICC for the purpose of seeking a recommendation on the issue of the quantum of same.

(e) In the event Canada accepts the recommendation of the ICC on the issue of the quantum of the claim of the First Nation for Loss of Use, the parties shall conclude a settlement on that basis.

3.4 *The First Nation shall be deemed to have abandoned its claim for Loss of Use in the event the First Nation:*

(a) provides Canada with a duly executed resolution by the Council to the effect that the First Nation has abandoned same, together with evidence that such decision has been ratified by a majority of the Eligible Members of the First Nation voting, and of those voting, a majority voting in favour, of such decision in a ratification process held in accordance with the procedure set out in Schedule "B" (with such amendments as the circumstances reasonably require); or

(b) fails to submit its claim for Loss of Use to Canada particularised in sufficient detail as to permit Canada to review such claim on its merits by December 1, 1994; or

(c) *fails to submit its claim to the ICC on the issue of whether a lawful obligation on Canada to compensate the First Nation for its claim for Loss of Use exists:*

(i) within eight months of the date on which it submits its claim for Loss of Use to Canada particularised in sufficient detail as to permit Canada to review such claim on its merits, in the event Canada fails to respond to same within six months of such date; or

(ii) *within 60 days of the date Canada advises the First Nation it is not prepared to recognize a lawful obligation to compensate the First Nation for its claim for Loss of Use*; or

(d) submits its Loss of Use claim to the ICC and the ICC recommends that Canada not recognise a lawful obligation to compensate the First Nation for its claim for Loss of Use; or

(e) fails to submit the claim to the ICC on the issue of quantum within 60 days of the later of:

(i) June 1, 1996; or

(ii) six months after the date the ICC renders its recommendation under Article 3.3(c)(ii)

in the event Canada does recognise a lawful obligation to compensate the First Nation for its claim for Loss of Use but the parties are unable to reach consensus as to the quantum of such claim by the later of those two dates; or

(f) fails to submit the claim to the ICC on the issue of quantum within 60 days of Canada advising the Council that it is not prepared to accept a recommendation of the ICC under Article 3.3(c)(ii).

3.5 *Canada shall be deemed to have rejected the claim of the First Nation for Loss of Use in the event Canada*:

(a) fails to respond to the submission of the First Nation within six months of receipt of same, provided such submission is particularised in sufficient detail as to permit Canada to review such claim on its merits; or

(b) *advises the Council in writing at any time that it is not prepared to recognise a legal obligation to compensate the First Nation for its claim for Loss of Use*:

(i) *following the submission of the claim to Canada by the First Nation*; or

(ii) following the recommendation of the ICC that the claim should be accepted for negotiation in the event the First Nation makes a submission to the ICC on the merits of the claim; or

(iii) following the recommendation of the ICC on the issue of quantum in the event the First Nation makes a submission to the ICC on that issue; or

> (c) fails to respond within 30 days to a recommendation of the ICC made pursuant to Article 3.3(c)(ii).[3]

Long Plain did, in fact, submit its claim for loss of use to Canada in November 1994, within the time frame contemplated by Article 3.3(a) of the Settlement Agreement. The claim was supported by a historical report entitled "A Treaty Land Entitlement Report Prepared for the Long Plain First Nation" by D.N. Sprague, a damage quantification report entitled "Evaluation of Treaty Land Entitlement: Long Plain" by Daryl F. Kraft, and legal submissions.[4]

In early 1995, Canada rejected Long Plain's claim. At that time, A.J. Gross, the Director of Treaty Land Entitlement for Indian and Northern Affairs, wrote to former Long Plain Chief Peter YellowQuill as follows:

> We have now completed our review of your claim for loss of use, submitted pursuant to our settlement agreement dated August 3, 1994. In our view you have not demonstrated a breach of lawful obligation which gives rise to damages for loss of use. Further, with respect to the quantification for damages, we believe that the Kraft report, submitted with your claim, bases its valuation conclusions on unsubstantiated assumptions and ideal, but non-factual, situations. A loss of use claim must, in our view, prove actual loss.
>
> We are prepared to meet with you to discuss our reasons for our view at your convenience. However, should you wish to expedite consideration of your claim by the ISCC [Indian Specific Claims Commission], as contemplated under the settlement agreement, you may consider this letter to be Canada's rejection of the claim under the Specific Claims Policy.
>
> As agreed, our rejection of this claim entitles your First Nation to receipt of the second instalment of your settlement monies [pursuant to Article 2.3(c) of the Settlement Agreement]. I am therefore providing a copy of this letter to our Ottawa office so that the transfer of funds to your trust account may take place.[5]

Following a meeting between representatives of the First Nation and Indian Affairs, Gross wrote a further letter to Chief YellowQuill explaining how Canada had determined that "the actions of Canada's duly authorized officials were reasonable and prudent in setting aside reserve land for the Long Plain Band under the provisions of Treaty No. 1." He continued:

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[3] Settlement Agreement, August 3, 1994 (ICC Documents, pp. 535-39). Emphasis added.

[4] Jeffrey F. Harris, Keyser Harris, Barristers & Solicitors, "Long Plain First Nation Loss of Use Claim," November 1994 (ICC Documents, pp. 1-319).

[5] A.J. Gross, Director, Treaty Land Entitlement, Department of Indian and Northern Affairs, to Chief Peter YellowQuill, Long Plain First Nation, February 27, 1995 (ICC Documents, p. 700).

> In all the circumstances we do not believe that that record supports your claim. We expect that any further activity on the claim will now take place before the Indian Specific Claims Commission (ISCC).[6]

Within one week of receiving Gross's letter, the former solicitors for Long Plain corresponded with the Commission to request an inquiry into the First Nation's loss of use claim.[7] The Commission convened a planning conference on August 29, 1995, in Edwin, Manitoba, to discuss the issues with the parties, following which the Commissioners reviewed the claim on September 22, 1995, and agreed to conduct the inquiry.[8]

MANDATE OF THE COMMISSION

The Commission's mandate to conduct inquiries pursuant to the *Inquiries Act* is set out in a commission issued on September 1, 1992. That commission directs:

> that our Commissioners on the basis of Canada's Specific Claims Policy ... by considering only those matters at issue when the dispute was initially submitted to the Commission, inquire into and report on:
>
> (a) whether a claimant has a valid claim for negotiation under the Policy where that claim has already been rejected by the Minister; and
>
> (b) which compensation criteria apply in negotiation of a settlement, where a claimant disagrees with the Minister's determination of the applicable criteria.[9]

The Specific Claims Policy is set forth in a 1982 booklet published by the Department of Indian Affairs and Northern Development entitled *Outstanding Business: A Native Claims Policy – Specific Claims*.[10] In considering a specific claim submitted by a First Nation to Canada, the Commission must assess whether Canada owes an outstanding "lawful obligation" to the First Nation in accordance with the following clear statement of Policy in *Outstanding Business*:

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[6] A.J. Gross, Director, Treaty Land Entitlement, Department of Indian and Northern Affairs, to Chief Peter YellowQuill, Long Plain First Nation, April 5, 1995 (ICC Documents, pp. 697-99).

[7] Loretta A. Meade, Keyser Harris, Barristers & Solicitors, to Kim Fullerton, Indian Claims Commission, April 12, 1995.

[8] Daniel Bellegarde and James Prentice, Co-Chairs, Indian Claims Commission, to Chief Peter YellowQuill and Council, Long Plain First Nation, September 25, 1995; Daniel Bellegarde and James Prentice, Co-Chairs, Indian Claims Commission, to Honourable Ron Irwin, Minister of Indian and Northern Affairs, and Honourable Allan Rock, Minister of Justice and Attorney General, September 25, 1995.

[9] Commission issued September 1, 1992, pursuant to Order in Council PC 1992-1730, July 27, 1992, amending the Commission issued to Chief Commissioner Harry S. LaForme on August 12, 1991, pursuant to Order in Council PC 1991-1329, July 15, 1991 (Consolidated Terms of Reference).

[10] Department of Indian Affairs and Northern Development, *Outstanding Business: A Native Claims Policy – Specific Claims* (Ottawa: Minister of Supply and Services, 1982), reprinted (1994) 1 ICCP 171 (hereafter *Outstanding Business*).

> The government has clearly established that its primary objective with respect to specific claims is to discharge its lawful obligation as determined by the courts if necessary.[11]

The Specific Claims Policy itself defines "lawful obligation" in this manner:

> **1) Lawful Obligation**
> The government's policy on specific claims is that it will recognize claims by Indian bands which disclose an outstanding "lawful obligation," i.e., an obligation derived from the law on the part of the federal government.
>
> A lawful obligation may arise in any of the following circumstances:
>
> i) The non-fulfillment of a treaty or agreement between Indians and the Crown.
>
> ii) A breach of obligation arising out of the Indian Act or other statutes pertaining to Indians and the regulations thereunder.
>
> iii) A breach of an obligation arising out of government administration of Indian funds or other assets.
>
> iv) An illegal disposition of Indian land.[12]

To assist Indian bands and associations in the preparation of their claims, the government has also prepared "guidelines" relating to the submission and assessment of specific claims and to the treatment of compensation. These guidelines have been incorporated into *Outstanding Business*, with the following guidelines being particularly germane to the present inquiry:

> **COMPENSATION**
>
> The following criteria shall govern the determination of specific claims compensation:
>
> 1) As a general rule, a claimant band shall be compensated for the loss it has incurred and the damages it has suffered as a consequence of the breach by the federal government of its lawful obligations. ***This compensation will be based on legal principles.***
>
> ...

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[11] *Outstanding Business*, 19; reprinted (1994) 1 ICCP 171 at 179.

[12] *Outstanding Business*, 20; reprinted (1994), 1 ICCP 171 at 179.

3) (i) *Where a claimant band can establish that certain of its reserve lands were never lawfully surrendered, or otherwise taken under legal authority*, the band shall be compensated either by the return of these lands or by payment of the current, unimproved value of the lands.

(ii) *Compensation may include an amount based on the loss of use of the lands in question, where it can be established that the claimants did in fact suffer such a loss. In every case the loss shall be the net loss.*[13]

THE COMMISSION'S INQUIRY PROCESS

The Planning Conferences and the Joint Statement of Agreed Facts

During the course of this inquiry, the Commission convened three planning conferences in an effort to settle the loss of use claim or, failing that, to define the scope of the inquiry and narrow the issues in dispute. The first planning conference was held on August 29, 1995, at the school on the Long Plain reserve, at which time the First Nation provided a statement of the issues and its position. At that meeting, it became clear that, from Canada's perspective, the August 3, 1994, settlement of Long Plain's treaty land entitlement had been based on the so-called "equity formula," which the First Nation considered artificial, inappropriate, and – in light of the much higher compensation to which the First Nation believed it would be entitled under a loss of use analysis – inadequate. Canada took the position that, although it did not recognize loss of use as the basis for a claim for damages, it nevertheless considered that the $16.5 million paid under the Settlement Agreement would be sufficient to compensate Long Plain for loss of use in any event.[14] Canada later provided its own statement of the issues and its position in a letter dated October 11, 1995.[15]

The second planning conference was convened in Ottawa on December 9, 1996, following the selection of new legal counsel for the First Nation as well as the election of subsequent Chief Marvin Daniels and a new Band Council. In preparation for that conference, counsel for the First Nation prepared a revised statement of the issues to be dealt with at the inquiry. The meeting was held subject to notice being taken of an objection raised by former Chief

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[13] *Outstanding Business*, 30-31; reprinted (1994), 1 ICCP 171 at 184. Emphasis added.

[14] Indian Claims Commission, Planning Conference, Long Plain First Nation Treaty Land Entitlement (Loss of Use), August 29, 1995.

[15] Bruce Becker, Counsel, Department of Justice, Specific Claims West, DIAND Legal Services, to Kathleen Lickers, Associate Counsel, Indian Claims Commission, October 11, 1995.

YellowQuill regarding the status of the First Nation's legal counsel and its newly elected Band Council.[16]

At the third planning conference in Ottawa on February 14, 1997, the process of the inquiry and the Commission's mandate were further clarified:

> The parties had discussed whether loss of use was a separate claim or a head of compensation. The [Settlement] agreement contemplated a two-step procedure, first, consideration of the "validity" of the loss of use claim, and, second (potentially) into compensation. It appeared that the process contemplated by the Agreement must govern. Thus, the first step would be to put before the Commission the issue of validity of a claim for loss of use, without any request for findings of fact. The Commission would be requested not to make findings of fact and to limit its review to the circumstances and principles governing the inclusion of compensation for loss of use in TLE [treaty land entitlement] claims, and whether it was payable in connection with the TLE claim covered by the Agreement. It was accepted, however, that some factual background was essential to an understanding of the validity issue, and the parties agreed to proceed by way of an Agreed Statement of Facts.[17]

On the basis of this agreement, the parties prepared and submitted the Joint Statement of Agreed Facts which forms the primary substance of the historical background comprising Part II of this report.

The Inquiry

Between the time of the First Nation's initial contact with the Commission on April 12, 1995, and the third planning conference on February 14, 1997, the parties tendered eight exhibits comprising approximately 700 pages of historical documentation and expert evidence, including among other things the Settlement Agreement, Long Plain's claim submission of November 1994, the Sprague and Kraft reports, and a critique of the Sprague report by Jim Gallo, Indian Affairs' Manager of Treaty Land Entitlement and Claims for the Manitoba Region.[18] However, the parties subsequently agreed that the inquiry would be expedited by placing the Joint Statement of Agreed Facts before the Commission and asking it to address the single issue of whether compensation for loss of use is available in the treaty land entitlement context. Ultimately, the Joint Statement of Agreed Facts was prepared by counsel for the First Nation and executed by Chief Marvin Daniels for the Long Plain First Nation on July 25, 1997, under authority of a Band Council Resolution dated July 24, 1997.[19] On behalf of Canada, counsel for Canada executed the Joint Statement of Agreed Facts on August 8, 1997.

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[16] Indian Claims Commission, Planning Conference, Long Plain First Nation Treaty Land Entitlement, December 9, 1996.

[17] Indian Claims Commission, Third Planning Conference, Long Plain First Nation Treaty Land Entitlement Loss of Use Claim, Revised Summary, February 14, 1997.

[18] Jim Gallo, Manager, Treaty Land Entitlement and Claims, Indian and Northern Affairs Canada, Manitoba Region, "Long Plain Treaty Land Entitlement Loss of Use Claim: Review and Comments on D.N. Sprague's Historical Report," January 23, 1995 (ICC Documents, pp. 321-518).

Counsel for Long Plain submitted written arguments to the Commission on August 27, 1997, to which counsel for Canada replied on September 26, 1997. The First Nation delivered rebuttal arguments on October 8, 1997, and the parties presented oral submissions at a final session in Winnipeg on October 17, 1997.

A complete summary of the written submissions, documentary evidence, transcripts, and the balance of the record in this inquiry is set forth in Appendix A of this report.

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[19] Long Plain First Nations Tribal Council, Band Council Resolution 97-72, July 24, 1997 (ICC Exhibit 3)

PART II

HISTORICAL BACKGROUND

THE JOINT STATEMENT OF AGREED FACTS

The Joint Statement of Agreed Facts on which the Commission has been expressly directed to rely is now reproduced in its entirety.

JOINT STATEMENT OF AGREED FACTS

LONG PLAIN FIRST NATION TREATY LAND ENTITLEMENT LOSS OF USE CLAIM

1. On August 3, 1994 Canada and the Long Plain Band entered into an agreement concerning the settlement of the Treaty Land Entitlement claim of the Long Plain Band. This agreement, the ***Treaty Land Entitlement Settlement Agreement***, provides in Article 3.1 that:

> The parties affirm that it is the intent and purpose of this Agreement to achieve a full and final settlement of the matter of the amount of land to be provided to the First Nation as provided for [in] the Per Capita Provision and all other claims relating thereto, provided that the First Nation reserves the right to consider a potential claim for Loss of Use as herein provided.

2. The ***Treaty Land Entitlement Settlement Agreement*** goes on in Article 3 to provide the process whereby any claim for loss of use brought by the Long Plain Band would be assessed by Canada under its Specific Claims Policy and, if not accepted for negotiations under that Policy, by the Indian Claims Commission. Canada has rejected the loss of use claim of the Long Plain Band under the Specific Claims Policy.

3. Treaty 1, a true copy of which is attached hereto as Schedule "A" to the Joint Statement of Agreed Facts, provided in part as follows:

> and for the use of the Indians of whom Oo-za-we-kwun is Chief, so much land on the south and east side of the Assiniboine, about twenty miles above the Portage, as will furnish one hundred and sixty acres for each family of five, or in that proportion for larger or smaller families, reserving also a further tract enclosing said reserve to comprise an equivalent to twenty-five square miles of equal breadth,

4. By virtue of Article 2 of the Revision to Treaty No. 1 of June 20, 1876, the Portage Band was divided into two bands. These two new Bands were the Long Plain or Short Bear Band and the Swan Lake or the Yellowquill Band:

> "Owing to the size of the said original Band, and the divisions existing amongst the Indians composing it, the said Band is divided into two Bands, namely the Band of those who adhere to Oo-za-we-kwun and the Band of those who adhere to Short Bear."

The same document recognized the White Mud River or Sandy Bay community as a new Band.

5. Article 3 of the June 20, 1876 Revision to Treaty No. 1, a copy of which is attached hereto as Schedule "B" to this Joint Statement of Agreed Facts, also provided that:

> "... and inasmuch, [as] by the said Treaty the Reserve to be allotted to the original Band, was one hundred and sixty acres [of land] for each family of five, or in that proportion for larger or smaller families, together with a tract enclosing the same equivalent to twenty-five square miles of equal breadth, it is hereby agreed that the separate reserves to be granted to the said three Bands, shall contain an amount of land equal to that stipulated to be given to the original Band, and such land shall be assigned [to] each Band in proportion to their relative numbers ..."

6. Article 3 of the June 20, 1876 Revision to Treaty No. 1 further provided that the reserve for Short Bear's Band would be "on the north bank of the Assiniboine River, in the vicinity of Long Plain."

7. Short Bear selected the site of [the] Long Plain reserve in July 1876 and J. Lestock Reid, D.L.S., located same in township 9 and 10, range 8, west of the principal meridian.

8. In his report of November 1876 to Surveyor General J.S. Dennis, a true copy of which is attached hereto as Schedule "C" to this Joint Statement of Agreed Facts, Reid states that the population statistics used for Swan Lake and White Mud River were 179 (36 families of 5) and 183 (37 families of 5) respectively. He noted that he used two formula[e] to calculate the size of the reserves: the 160 acre per family of five for the "homestead" area and 143 acres per family of five for the distribution of each band's share of the "25 square miles". No numbers for Long Plain are listed, but by inference from the population figures from the two other Bands and the 143 acres per family reference, Reid may have used a statistic of 197 (39 families of 5) to compute the size of the Long Plain reserve.

9. The number of people paid treaty annuities [on] June 20, 1876 with Chief Short Bear was 209. The reserve as selected by Short Bear and located by J. Lestock Reid and referred to in Order in Council No. 2876 of November 21, 1913 contained an area of 10,880 acres.

10. Canada delivered to Long Plain a letter from the Minister, then the Honourable John Munro dated the 5th day of November, 1982 accepting the Band's claim of an outstanding treaty land entitlement for negotiations under the Government of Canada's Claims Policy, "Outstanding Business: A Native Claims Policy", a true copy of which is attached hereto as Schedule "D" to this Joint Statement of Agreed Facts.

11. Canada says research and analysis of the Long Plain treaty annuity lists and Band memberships records, conducted by the Manitoba Regional Office of the Department of Indian Affairs, Lands & Trusts section during 1991 and 1992, suggests that the population of the Long Plain Band at the time of the selection and location of the reserve was 223. This number was composed of 209 people paid annuities on June 20, 1876; 15 people subsequently paid arrears for that date and 3 people who were absent but not paid arrears for that date, less 4 people previously counted for land with another band.

12. The Long Plain Band's *Loss of Use Claim* of November, 1994 relies on a population statistic of 350 as the total number of the Band for treaty land entitlement purposes. This number is derived from a population statistic reported in the newspaper *The Manitoban* on August 3, 1871:

> **"Lower Fort Garry, July 28, 1871**
> **THE INDIAN REPRESENTATIVES**
> The first business which came up was the presentation of those who were to carry on the negotiations on behalf of the tribe and to [be]responsible for them. They were named as follows: – Yellow Quill, a Chief from the Portage, first presented himself. He said his band numbered 1,000 present 326."

13. For the purposes of *The Treaty Land Entitlement Settlement Agreement* negotiations, the parties agreed that [the] Long Plain reserve referred to in Order in Council 2876 of November 21, 1913 consisted of 10,880 acres, of which 5,577 acres were agreed for purposes of negotiations to be attributable to Long Plain's share of the 25 square mile promise in the Treaty calculated as 143 acres per family of five by the 39 families inferentially used by Reid as the basis of calculation. The *Treaty Land Entitlement Settlement Agreement* addressed only the issue of the per capita entitlement that the Long Plain Band was entitled to by virtue of Treaty No. 1 of 1871 and its Revision in 1876 and not its proportionate share of the 25 square miles.

14. Hence, the parties agreed for purposes of The Treaty Land Entitlement Settlement Agreement negotiations that 5,303 acres of the reserve were attributable to the per capita clause (10,880 - 5,577 = 5,303).

15. Canada calculates the shortfall as of the date of the selection and location of the Long Plain reserve to be 1,833 acres: 223 Band members multiplied by 32 acres (per capita allotment under Treaty 1) less per capita lands received (32 x 223 = 7,136 acres - 5,303 received = shortfall of 1,833 acres).

16. The Long Plain Band calculates the shortfall as 5,897 acres (*Loss of Use Claim*, p. 4).

17. The population of the Long Plain Band as listed on the base pay list for each year declined after 1876 commencing 1877 when the pay list number was 189. The population listed on the pay lists declined further from there, reaching a low of 110 in 1902 and 1916. It was not until 1934 that the base pay list for the Long Plain Band reached its former level of 209 (it was 213 in that year). Attached hereto as Schedule "E" to this Joint Statement of Agreed Facts, is a chart showing the base pay list numbers from 1876 until 1955.

18. In response to an undertaking by Canada to deliver to the Claimant Band "all documents identifying Government policy regarding loss of use in the Treaty Land Entitlement Context", Canada submitted one document as of the date hereof being a letter from Anne-Marie Robinson, Director of Policy and Research, Specific Claims Branch, to the Claimant's solicitor, Rhys Wm. Jones dated July 23, 1997, attached hereto as Schedule "F" to this Joint Statement of Agreed Facts.

19. During the course of negotiation of the Canada–Long Plain Treaty Land Entitlement Agreement of August 3, 1994, Canada delivered to the Band the following correspondence, originals or true copies of which are attached hereto and scheduled as follows:

December 17, 1992	Balfour to Yellowquill	Schedule "G"
February 23, 1993	Gross to Yellowquill	Schedule "H"
March 18, 1993	Hilchey to Yellowquill	Schedule "I"
April 19, 1993	Hilchey to Yellowquill	Schedule "J"
September 3, 1993	Gallagher to Yellowquill	Schedule "K"
September 24, 1993	Browes to Yellowquill	Schedule "L"

20. In response to the First Nation's submission pursuant to Article 3 of the Canada–Long Plain TLE Settlement Agreement, that it was entitled to compensation for Loss of Use, Canada rejected same with explanation as contained in two letters addressed to the First Nation dated February 27, 1995 and April 5, 1995 both from A.J. Gross to then Chief Peter Yellowquill, true copies of which are attached hereto as Schedules "M" and "N" respectively to this Joint Statement of Agreed Facts.

The parties hereto jointly agree that the Indian Claims Commission, may for purposes of this inquiry alone, take the above facts to be true.[20]

One aspect of the Joint Statement of Agreed Facts requires further discussion.

THE SHORTFALL ACREAGE

For the purposes of the first stage of this inquiry, the Commission has been directed to proceed on the basis that there was a shortfall in Canada's provision of treaty land to the Long Plain First Nation. The quantum of that shortfall is, for current purposes, not relevant. It is, however, worth noting the divergent positions of the parties on this question.

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[20] Joint Statement of Agreed Facts, Long Plain First Nation Treaty Land Entitlement Loss of Use Claim, August 8, 1997 (ICC Exhibit 2).

Canada's basis for calculating the quantum of the shortfall acreage is set forth in paragraph 15 of the Joint Statement of Agreed Facts and requires no further explanation. Long Plain's figure is less obvious. In its November 1994 loss of use claim, the First Nation contended that, based on the annuity paylists, 35 percent of the 1000 people under Chief Oo-za-we-kwun as reported in the *Manitoban* on August 3, 1871, or 350 individuals, belonged to that faction of the Band that eventually aligned itself under Short Bear. Multiplying that population by the Treaty 1 formula of 32 acres per person resulted in a treaty land entitlement of 11,200 acres, less the 5303 acres already received, resulting in a shortfall of 5897 acres.[21] Ultimately, under the terms of the 1994 Settlement Agreement, the parties agreed that, to calculate the compensation due to the First Nation for its treaty land entitlement claim, the shortfall would be pegged at 1877 acres.[22] How this figure was determined is not clear.

It is important to note that the parties have expressly agreed not to be bound by the figure of 1877 acres that they negotiated as the applicable shortfall for treaty land entitlement purposes. In that regard Article 3.7 of the Settlement Agreement provides:

> 3.7 The payment of the Federal Payment by Canada and the acceptance of same by the First Nation shall be without prejudice to the positions either may advance with respect to the Loss of Use claim and, without limiting the generality of the foregoing, Canada shall be free to argue that no such claim exists or, in the alternative that such claim, if it exists, should properly be based on the First Nation not receiving an additional 1,877 acres to which it was entitled under the Per Capita Provision in 1876.[23]

Thus, although the parties agreed to accept the negotiated shortfall of 1877 acres for the purposes of argument in this first stage of the loss of use inquiry, counsel for Long Plain made it clear in a letter to the Commission that neither party was to be held to this figure should a second hearing to quantify damages be required:

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[21] Jeffrey F. Harris, Keyser Harris, Barristers & Solicitors, "Long Plain First Nation Loss of Use Claim," November 1994 (ICC Documents, p. 6).

[22] Settlement Agreement, August 3, 1994 (ICC Documents, pp. 539-40).

[23] Settlement Agreement, August 3, 1994 (ICC Documents, pp. 539-40). It is not clear how the shortfall figure of 1877 acres was calculated in light of Canada's position that the shortfall was 1833 acres and Long Plain's position that the number should be 5897. Nevertheless, it appears that the 1877 figure formed the basis of the negotiated resolution of the treaty land entitlement claim under the Settlement Agreement.

> Further to the hearing held by the Commissioners in Winnipeg on Friday, October 17, 1997 in the above matter, our client has asked us to reinforce the point made in the [Joint] Statement of Agreed Facts that for purposes of this inquiry the Commission could proceed on the factual agreement that there was a 1877 acre shortfall but that this does not bind the First Nation in relation to a second hearing. That is, the Commissioners could proceed to determine what rules govern appropriate compensation on the assumption that there was a shortfall and that for purposes of the first hearing and the first hearing only there was agreement that the Commissioners could assume the shortfall was 1877 acres. The actual shortfall is a matter of debate as between [the] Long Plain First Nation and Canada and will be dealt with in the context of the second inquiry. Indeed, Canada has likewise reserved the right to argue in the context of a second inquiry that there is no shortfall.[24]

As the Commission understands the Settlement Agreement and the stated position of the First Nation, it is the *fact* of the shortfall, to which the parties have agreed for present purposes, and not the *extent* of the shortfall that is relevant at this stage of the inquiry. As the parties have requested, we make no finding on either issue at this time.

We turn now to the issue be considered by the Commission.

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[24] Rhys Wm. Jones, Lofchick Jones & Associates, to Thomas Gould, Counsel, Indian Claims Commission, November 18, 1997.

PART III

ISSUE

The parties are agreed that this inquiry is concerned with just one issue of law:

Is a band with an admitted shortfall in its treaty land entitlement entitled to be compensated for its loss of use of the shortfall based on the compensation criteria within the Specific Claims Policy?

Our analysis follows.

PART IV

ANALYSIS

The case before us concerns the extent to which a First Nation may seek compensation in circumstances in which Canada has failed to provide that First Nation with its full entitlement to land under the terms of treaty. Such cases are known as treaty land entitlement claims, and at issue in these proceedings is the First Nation's claim that "loss of use" is a particular head of damage that logically flows from an outstanding lawful obligation owed by Canada to the Band. The term "loss of use" encompasses those claims that arise when a band does not receive the quantum of land expressed in the treaty until 50, 100, or, as in this case, 118 years after the consummation of that document.

Whether a band with an admitted shortfall in its treaty land entitlement is entitled to be compensated for the loss of use of the shortfall acreage turns initially on Canada's Specific Claims Policy, which is itself based upon the concepts of "lawful obligation" and "legal principle." The specific legal question with which we are concerned, however, is Canada's liability in circumstances in which the appropriate quantum of land was not, for any of a number of reasons, set aside for the use and benefit of the band. Is the government merely responsible to deliver up the remainder of the full land entitlement, or does its obligation extend, in law, to include compensatory damages or restitutionary compensation that follow from the government's delay? Other related legal issues also arise. To what extent do common law principles, such as foreseeability, remoteness, causation, and mitigation, apply? Is the nature of the Crown's conduct, whether good or bad, germane to the questions of liability and quantum?

From these questions it can be seen that the single legal issue in this inquiry as framed by Long Plain and Canada features aspects relating to, first, Canada's *liability* arising from the failure to provide the First Nation with its full measure of treaty land, and, second, in general terms, the ***quantum*** of compensation to which the First Nation will be entitled should liability be established for its "loss of use" of the shortfall land. The first part of our analysis will address the liability issue, followed by our review and recommendations on the question of compensation.

LIABILITY FOR LOSS OF USE OF THE SHORTFALL LAND

The Nature of Loss of Use

Generally speaking, loss of use in the context of a treaty land entitlement claim encompasses compensatory or restitutionary claims advanced by a band because its full entitlement to reserve land was not allotted at the required time. We note parenthetically that loss of use claims can also arise in circumstances where a band's lands have been improperly surrendered to the Crown or have been otherwise taken by the Crown without legal authority.

The parties in this case have specifically reserved the First Nation's right to advance a claim for loss of use under Article 3.1 of the 1994 Settlement Agreement, and they have outlined in a general way the broad parameters of the phrase "loss of use" in Article 1.1(f):

> **ARTICLE 1: DEFINITIONS**
> 1.1 In this Agreement: ...
>
> (f) "Loss of Use" means all claims of whatever kind or nature whatsoever the First Nation has had, has now, or may hereafter have relating to or arising from the fact that the Portage Band, the First Nation, and the other successors to the Portage Band did not receive the remaining land to which it was [sic]or any members of the First Nation were entitled under the Per Capita Provision....[25]

To place this definition in its proper context, it is also necessary to recite the Per Capita Provision of the Settlement Agreement, as set forth in Article 1.1(j):

> (j) "Per Capita Provision" means the following provision contained in Treaty No. 1:
>
> "And Her Majesty the Queen hereby agrees and undertakes to lay aside and reserve for the sole and exclusive use of the Indians the following tracts of land, that is to say:
>
> ... for the use of the Indians of whom Oo-za-we-kwun is Chief, so much land on the south and east side of the Assiniboine, about twenty miles above the Portage, as will furnish one hundred and sixty acres for each family of five, or in that

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[25] Settlement Agreement, August 3, 1994 (ICC Documents, pp. 528 and 530).

> proportion for larger or smaller families ... it being understood, however, that if, at the date of the execution of this treaty there are any settlers within the bounds of any lands reserved by any band, Her Majesty reserves the right to deal with such settlers as She shall deem just, so as not to diminish the extent of the land allotted to the Indians"
>
> and the following provision of the revision to Treaty No. 1 made on or about June 20, 1876:
>
> "and it is further agreed that a Reserve shall be assigned to the Band, of which Short Bear is Chief, by Her Majesty's said Commissioner or special Commissioner on the north side of the Assiniboine River, in the vicinity of the Long Plain ...
>
> ... it is hereby agreed that the separate Reserves to be granted to the said three Bands shall contain an amount of land equal to that stipulated to be given to the original Band, and such land shall be assigned to each Band in proportion to their relative numbers so that each Band shall receive their fair and just share of the said land ..."[26]

These provisions establish the content of Long Plain's claim. It can be seen that loss of use is defined very broadly and includes any claim the First Nation might have as a result of Canada's failure to provide it with its full measure of reserve land, whether under (a) the Treaty 1 formula of 160 acres for each family of five, or (b) the terms of the 1876 revision relating to the proportional allocation among Yellow Quill, Short Bear, and the White Mud people of the 25 square mile area referred to in Treaty 1. The Commission has not received any representations regarding whether this latter 25 square mile area was properly allocated, and therefore we make no comment on this issue at this time.

The Specific Claims Policy

The initial question, then, is whether loss of use claims are compensable under the federal government's Specific Claims Policy of 1982, entitled *Outstanding Business.*

This Commission has had many years of experience in the interpretation of the Specific Claims Policy and would observe that the wisdom of the Policy flows from its reliance upon the concept of "lawful obligation." The Policy is, in fact, constructed upon lawful obligation as that concept has evolved and continues to evolve through the process of judicial determination in Canada.

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[26] Settlement Agreement, August 3, 1994 (ICC Documents, p. 532).

Describing itself as "A Renewed Approach to Settling Specific Claims," the Policy in its opening paragraphs emphasizes the central importance of lawful obligation:

> The government has clearly established that *its primary objective with respect to specific claims is to discharge its lawful obligation* as determined by the courts if necessary.[27]

As we have seen, the Policy carries on to state:

> **1) Lawful Obligation**
> The government's policy on specific claims is that it will recognize claims by Indian bands which disclose an outstanding "lawful obligation," i.e., *an obligation derived from the law on the part of the federal government.*[28]

Outstanding Business also incorporates certain compensation "guidelines" within the Specific Claims Policy. The two that we have identified as relevant to these proceedings are paragraphs 1 and 3:

> **COMPENSATION**
> The following criteria shall govern the determination of specific claims compensation:
>
> 1) As a general rule, a claimant band shall be compensated for the loss it has incurred and the damages it has suffered as a consequence of the breach by the federal government of its lawful obligations. *This compensation will be based on legal principles.*
>
> ...
>
> 3) (i) *Where a claimant band can establish that certain of its reserve lands were never lawfully surrendered, or otherwise taken under legal authority*, the band shall be compensated either by the return of these lands or by payment of the current, unimproved value of the lands.
>
> (ii) *Compensation may include an amount based on the loss of use of the lands in question, where it can be established that the claimants did in fact suffer such a loss. In every case the loss shall be the net loss.*[29]

In the Commission's view, we must establish in this inquiry whether loss of use constitutes a "lawful obligation" within the meaning of *Outstanding Business*. As paragraph 1 of the compensation guidelines suggests, whether such a lawful obligation exists is a question to be determined in accordance with Canadian "legal principles."

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[27] *Outstanding Business*, 19; reprinted (1994), 1 ICCP 171 at 199. Emphasis added.
[28] *Outstanding Business*, 20; reprinted (1994), 1 ICCP 171 at 180. Emphasis added.
[29] *Outstanding Business*, 30-31; reprinted (1994), 1 ICCP 171 at 184. Emphasis added.

Before addressing these legal principles, however, we feel obliged to address briefly, as a subsidiary point, the effect of paragraph 3 of the "compensation guidelines" in the Specific Claims Policy. Arguably, since paragraph 3 of the guidelines relates to circumstances in which "a claimant band can establish that certain of its reserve lands were never lawfully surrendered, or otherwise taken under legal authority," it may not apply at all to the circumstances of this case: the lands with respect to which Long Plain claims compensation for loss of use were neither unlawfully surrendered nor taken without legal authority – they were never provided to Long Plain in the first place. However, it remains to be considered whether, by specifically providing that compensation for loss of use may be payable where reserve lands were unlawfully surrendered or taken without legal authority, the drafters of *Outstanding Business* intended that loss of use would *not* be compensable in other circumstances. This is the principle of interpretation referred to as *expressio unius est exclusio alterius* ("to express one thing is to exclude the other").

Canada has not addressed paragraph 3 of the compensation guidelines in its submissions. Similarly, Long Plain has not referred to this guideline expressly, although in its rebuttal submissions it argues:

> The Claimant also submits that the Band should not be in a worse position than if the land had been the corpus of a trust and [had been] lost through the careless conduct or reckless disregard of duty by a Trustee. In such a case, the beneficiaries would be entitled to restoration of the corpus of the trust and compensation reflecting its [sic]opportunity losses on a theoretical highest and best [use] basis. The only thing that distinguishes the one from the other is that in the latter the land is given and then lost through the trustee's breach whereas in the former the breach precedes and causes the loss. In the end, **the loss to the beneficiary is the same**.[50]

Similarly, during oral argument, counsel for the First Nation stated:

> I for the life of me can't figure out why a band should be entitled to more compensation if its lands are taken illegally than if it never receives the land in the first place under what I regard as specious argument that because there's no fixed date for the provision of treaty land, Canada is under no obligation to provide it at any given date.

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[50] Rebuttal Submissions on Behalf of the Long Plain First Nation, October 8, 1997, pp. 19-20. Emphasis in original.

> therefore there can be no loss of use, and frankly we [Canada] could give you the 1,877 acres today, and we would not be in breach of the treaty.[31]

Other than these limited statements, each party framed its arguments on the basis that the question must be determined within the general legal principles contemplated in paragraph 1.

We agree. In our view, paragraph 3 does not apply to the facts of this case because it refers only to situations in which reserve lands were unlawfully surrendered or taken without legal authority.

Part Three of the Specific Claims Policy, in which paragraph 3 is found, is, in any event, simply entitled "Guidelines." The use of that term suggests to us that, as a guideline, paragraph 3 is intended to be interpretive only. In fact, the introductory paragraph to the "Guidelines" suggests as much:

> In order to assist Indian bands and associations in the preparation of their claims the government has prepared guidelines pertaining to the submission and assessment of specific claims and on the treatment of compensation. While *the guidelines form an integral part of the government's policy on specific claims*, they are set out separately in this section for ease of reference.[32]

The "Guidelines" represent statements of policy and do not purport to define in an exhaustive manner the "legal principles" upon which compensation is to be determined. As noted previously, the wisdom and strength of the Specific Claims Policy is derived from its clear reliance upon "lawful obligation" as an evolving concept. In circumstances in which an analysis of the law leads to a clear conclusion that "loss of use" may be claimed as part of the "lawful obligation" owed by Canada to a First Nation, we are not prepared to elevate the "Guidelines" in *Outstanding Business* – especially ones of uncertain application such as paragraph 3 – to a position where they will override the clear application of the Specific Claims Policy.

We turn now to the question of Canada's lawful obligation in this case.

The Legal Principles Underlying Lawful Obligation

Assuming then that a treaty land entitlement shortfall exists, does a claim for loss of use follow? Does loss of use constitute a valid lawful obligation?

In an effort to persuade the Commission that loss of use *does* constitute a valid lawful obligation, counsel for Long Plain has devoted considerable time and energy to characterizing Canada's failure to provide the First Nation with its full measure of treaty land as a breach of fiduciary duty. According to counsel for Canada, the reasons why it is important to the First Nation to characterize Canada's duty in this case as fiduciary are, first, to make any breach of the duty "readily discernible," since the higher standard of duty required of a fiduciary will be imposed, and, second, to import equitable principles regarding the assessment of damages.[33] However, we do not agree that a breach of fiduciary duty represents the only basis of liability in the event of a treaty land entitlement shortfall. As for the argument that it is necessary to characterize Canada's duty as fiduciary to permit the Commission to import equitable principles to the assessment of damages, we also do not agree, as we will discuss later, that the remedies available to the First Nation are dictated by such a characterization of the breach.

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[31] ICC Transcript, October 17, 1997, p. 105 (Rhys Jones).

[32] *Outstanding Business*, 29; reprinted (1994), 1 ICCP 171 at 183. Emphasis added.

In our view, Canada's failure to provide a band with its full treaty land entitlement gives rise to lawful obligations to make up the shortfall and to compensate the band for loss of use. There are three possible bases in law for such a conclusion. We have considered each of these. First, Canada's failure to deliver the band's entire land entitlement may be said to be a breach of the terms of the treaty itself. Second, it is arguable that this failure is also a violation of the general trust-like responsibilities that Canada owes First Nations in respect of matters concerning Indian title, and is therefore a breach of fiduciary duty. Third, Canada's conduct giving rise to the shortfall may, in certain cases, substantiate a separate cause of action based upon breach of fiduciary duty.

Breach of Treaty

Although it may be said that the relationship between Canada and First Nations is fiduciary in nature, we consider that, in the context of treaty land entitlement, Canada's *primary* obligation to First Nations arises not from the fiduciary nature of the relationship, but rather from the fact that the people of Canada, as represented by their government, entered into a solemn treaty relationship with these aboriginal people. Canada as a party to that relationship has an obligation to live up to the terms of the treaty. In our view, it is without question that such treaty covenants are of sufficient importance in modern Canadian society that they stand on their own as *sui generis* obligations independent of the concept of fiduciary obligation for their legitimacy or enforceability. To suggest that the treaties are reliant on the vehicle of fiduciary duty to make them enforceable would fail to accord them the historical and constitutional importance that they have acquired in Canada. In our view, the treaties are fundamental in defining the nature of the relationship between the Crown and aboriginal people.

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[33] Submissions on Behalf of the Government of Canada, September 26, 1997, pp. 10-11.

This treatment of the treaty as the primary source of Canada's lawful obligation to First Nations in the treaty land entitlement context is consistent with earlier statements of principle by this Commission. In December 1995, while addressing the Fort McKay First Nation's argument that Canada had committed a "fundamental and blatant" breach of fiduciary obligation by unilaterally changing its policy regarding individuals entitled to be counted in quantifying treaty land entitlement, the Commission stated:

> We begin with the proposition that treaty and fiduciary obligations overlap, in that *the Crown has a fiduciary duty to live up to its treaty obligations*. It seems to us, however, that the question of breach of treaty comes first, and that it subsumes these further questions. In other words, the issue is not whether Canada "chose" to interpret the treaty in a manner that restricts the entitlement of First Nations and thus improperly exercised its "discretion," or whether Canada is treating First Nations signatories to the treaty unequally, but whether Canada's interpretation of the treaty is correct. If it is not, and the treaty land entitlement has not been met, then the conclusion of this inquiry will be that Canada has an outstanding lawful obligation towards the Fort McKay First Nation.[34]

Three months later, the Commission treated Canada's failure to include "late additions" to a band's population – including new adherents to treaty and transferees from landless bands – for treaty land entitlement purposes as a breach of Canada's obligations under treaty. In its report on the claim of the Lac La Ronge Indian Band, the Commission stated:

> Canada's failure to provide the full land entitlement at date of first survey, or subsequently to provide sufficient additional land to fulfil any new treaty land entitlement arising by virtue of "late additions" joining the band after first survey, constitutes a breach of the treaty and a corresponding breach of fiduciary obligation.[35]

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[34] Indian Claims Commission, *Fort McKay First Nation Treaty Land Entitlement Inquiry* (1996), 5 ICCP 3 at 57. Emphasis added.

[35] Indian Claims Commission, *Lac La Ronge Indian Band Treaty Land Entitlement Inquiry* (1996), 5 ICCP 235 at 318.

The Commission endorsed this principle in its later reports on the treaty land entitlement claims of the Kahkewistahaw and Kawacatoose First Nations.[36]

Canada's assumption of the obligation or undertaking to deliver the full quantum of land required under the terms of the treaties must be viewed as integral to the treaty relationship. It is to be remembered that the very purpose of the treaties was to quiet aboriginal title in exchange for a specified quantum of land that Canada was to set aside at a band's request. Indeed, reserve lands constituted the very *res* of the treaties, and the failure to deliver a band's full entitlement within a reasonable time of being asked to do so must be considered a significant breach capable of attracting remedies in both law and equity.

We find support for this conclusion in Chief Justice Lamer's comments on the implications of the *sui generis* nature of Indian land rights in the context of a surrender claim in *St. Mary's Indian Band v. City of Cranbrook*:

> I want to make it clear from the outset that native land rights are *sui generis*, and that nothing in this decision should be construed as in any way altering that special status. As this Court held in *Guerin v. The Queen*, [1984] 2 S.C.R. 335, 13 D.L.R. (4th) 321, *Canadian Pacific Ltd. v. Paul*, [1988] 2 S.C.R. 654, 53 D.L.R. (4th) 487, and *Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)*, [1995] 4 S.C.R. 344, 130 D.L.R. (4th) 193, native land rights are in a category of their own, and as such, traditional real property rules do not aid the Court in resolving this case.
>
> But what does this really mean? As Gonthier J. stated at paras. 6 and 7 in *Blueberry River*, *supra*, it means that *we do not approach this dispute as would an ordinary common law judge*, by strict reference to intractable real property rules.... [W]e do not focus on the minutiae of the language employed in the surrender documents and should not rely upon traditional distinctions between determinable limitations and conditions subsequent in order to adjudicate a case such as this. Instead, *the Court must "go beyond the usual restrictions" of the common law* and look more closely at the respective intentions of the St. Mary's Indian Band and the Crown at the time of the surrender of the airport lands.[37]

In this context, it seems clear that a claim by an Indian band with regard to a shortfall in the allocation of its reserve lands should constitute an enforceable *sui generis* obligation. It is our view that, at law, such claims are clearly on a higher plane than contractual obligations, but even if they are not, they should still attract the intervention of the courts of equity. We have no doubt that the ***sui generis*** treaty obligation, being equitable in nature, can be enforced by the courts, either through an award of specific performance or, in circumstances in which specific performance may not be available, an award of, first, compensatory damages in lieu of the shortfall land, and, second, compensatory damages for late performance. One way – although not the only way – of measuring the latter form of damages is by means of a loss of use analysis. Ultimately, regardless of whether we conclude that the shortfall in the present case amounts to a breach of fiduciary duty or a breach of treaty, Canada's lawful obligation will be measured as the compensation or damages a court could award under general principles of law and equity.

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[36] Indian Claims Commission, *Kahkewistahaw First Nation Treaty Land Entitlement Inquiry* (1998), 6 ICCP 21 at 77; Indian Claims Commission, *Kawacatoose First Nation Treaty Land Entitlement Inquiry* (1996), 5 ICCP 73 at 183.

[37] *St. Mary's Indian Band v. City of Cranbrook* (1997), 147 DLR (4th) 385 at 391-92, Lamer CJC.

That being said, however, we wish to be clear that we have based our conclusion in this report on our finding that Canada's failure to deliver up the proper quantum of reserve land amounts, in law, to a breach of treaty.

Breach of Fiduciary Obligation to Comply with Terms of Treaty

As the foregoing excerpts from the Commission's earlier reports imply, although we consider the treaties to be the primary source of Canada's obligations in the treaty land entitlement context, we are also of the view that "the Crown has a fiduciary duty to live up to its treaty obligations." A failure by Canada to provide a band with its full measure of treaty land is a breach of fiduciary duty because it violates the general trust-like responsibilities that Canada owes First Nations in matters concerning Indian title. However, breach of fiduciary duty constitutes only an ***alternative*** basis for liability since, as noted above, the cornerstone of our conclusion regarding liability is that Canada is in breach of the terms of Treaty 1.

The fiduciary relationship of Canada and First Nations has been clearly established by an increasingly lengthy line of cases beginning with *Guerin v. The Queen*[38] in which the Supreme Court of Canada has repeatedly recognized the ***sui generis*** or "unique character both of the Indians' interest in land and of their historical relationship with the Crown."[39] The effect of these decisions is that the relationship between the Crown and aboriginal peoples is "trust-like" or fiduciary in nature, particularly in relation to the reservation and protection of treaty lands.

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[38] *Guerin v. The Queen*, [1984] 2 SCR 335, [1984] 6 WWR 481, 13 DLR (4th) 96, [1985] 1 CNLR 120.

[39] *Guerin v. The Queen*, [1984] 2 SCR 335 at 387, [1984] 6 WWR 481, 13 DLR (4th) 96, [1985] 1 CNLR 120, Dickson J.

It will be recalled that, in *Guerin*, the Musqueam Band surrendered 162 acres of reserve land to the Crown for lease to a golf club on the understanding that the lease would contain the terms and conditions that were presented to and agreed upon by the Band Council. The Band later discovered that the terms of the lease obtained by the Crown were significantly different from those the Band had agreed to and indeed were less favourable. All eight members of the Court found that Canada had breached its duty to the Band, although Wilson J (Ritchie and McIntyre JJ concurring) founded the obligation on trust principles and Estey J considered the relationship to be one of principal and agent. However, Dickson J (as he then was), with the concurrence of Beetz, Chouinard, and Lamer JJ, took a different approach:

> *In my view, the nature of Indian title and the framework of the statutory scheme established for disposing of Indian land places upon the Crown an equitable obligation, enforceable by the courts, to deal with the land for the benefit of the Indians. This obligation does not amount to a trust in the private law sense. It is rather a fiduciary duty*. If, however, the Crown breaches this fiduciary duty it will be liable to the Indians in the same way and to the same extent as if such a trust were in effect.
>
> *The fiduciary relationship between the Crown and the Indians has its roots in the concept of aboriginal, native or Indian title. The fact that Indian bands have a certain interest in lands does not, however, in itself give rise to a fiduciary relationship between the Indians and the Crown*. The conclusion that the Crown is a fiduciary depends upon the further proposition that the Indian interest in the land is inalienable except upon surrender to the Crown.[40]

Dickson J continued:

> [T]he Indians' interest in land is an independent legal interest. It is not a creation of either the legislative or executive branches of government. The Crown's obligation to the Indians with respect to that interest is therefore not a public law duty. While it is not a private law duty in the strict sense either, it is nonetheless in the nature of a private law duty. Therefore, in this *sui generis* relationship, it is not improper to regard the Crown as a fiduciary.[41]

Dickson J later added:

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[40] *Guerin v. The Queen*, [1984] 2 SCR 335 at 376, [1984] 6 WWR 481, 13 DLR (4th) 96, [1985] 1 CNLR 120, Dickson J. Emphasis added.

[41] *Guerin v. The Queen*, [1984] 2 SCR 335 at 385, [1984] 6 WWR 481, 13 DLR (4th) 96, [1985] 1 CNLR 120, Dickson J.

> The Crown's fiduciary obligation to the Indians is therefore not a trust. To say as much is not to deny the obligation is trust-like in character. As would be the case with a trust, the Crown must hold surrendered land for the use and benefit of the surrendering Band. The obligation is thus subject to principles very similar to those which govern the law of trusts concerning, for example, the measure of damages for breach. The fiduciary relationship between the Crown and the Indians also bears a certain resemblance to agency, since the obligation can be characterized as a duty to act on behalf of the Indian Bands who have surrendered lands, by negotiating for the sale or lease of the land to third parties. But just as the Crown is not a trustee for the Indians, neither is it their agent; not only does the Crown's authority to act on the Band's behalf lack a basis in contract, but the Band is not a party to the ultimate sale or lease, as it would be if it were the Crown's principal. I repeat, the fiduciary obligation which is owed to the Indians by the Crown is *sui generis*. Given the unique character both of the Indians' interest in land and of their historical relationship with the Crown, the fact that this is so should occasion no surprise.[42]

Six years later, in *R. v. Sparrow*,[43] decided in 1990, the Supreme Court once again considered the application of fiduciary principles to the relationship between Canada and a member of a First Nation. The case dealt with aboriginal fishing rights – specifically, whether the restriction in the federal *Fisheries Act* regarding the permitted length of a drift net was inconsistent with section 35 of the *Constitution Act, 1982*, and therefore invalid. In outlining the approach to be taken with respect to interpreting section 35, Dickson CJ and La Forest J, who co-wrote the decision of the entire Court, gave a broad interpretation to the fiduciary analysis in *Guerin*:

> In *Guerin*, *supra*, the Musqueam Band surrendered reserve lands to the Crown for lease to a golf club. The terms obtained by the Crown were much less favourable than those approved by the Band at the surrender meeting. This Court found that the Crown owed a fiduciary obligation to the Indians with respect to the lands. The *sui generis* nature of Indian title, and the historic powers and responsibility assumed by the Crown constituted the source of such a fiduciary obligation. In our opinion, *Guerin*, together with *R. v. Taylor and Williams* (1981), 34 O.R. (2d) 360, [1981] 3 C.N.L.R.114, ground a general guiding principle for s. 35(1). That is, *the Government has the responsibility to act in a fiduciary capacity with respect to aboriginal peoples. The relationship between the Government and aboriginals is trust-like, rather than adversarial, and contemporary recognition and affirmation of aboriginal rights must be defined in light of this historic relationship.*[44]

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[42] *Guerin v. The Queen*, [1984] 2 SCR 335 at 386-87, [1984] 6 WWR 481, 13 DLR (4th) 96, [1985] 1 CNLR 120, Dickson J.

[43] *R. v. Sparrow*, [1990] 1 SCR 1075, [1990] 3 CNLR 160.

[44] *R. v. Sparrow*, [1990] 1 SCR 1075 at 1108, [1990] 3 CNLR 160, Dickson CJ and La Forest J. Emphasis added.

The following year, in ***Ontario (Attorney General) v. Bear Island Foundation***,[45] the Court offered a further glimpse into the fiduciary obligations owed by Canada to its native peoples. Ontario commenced the proceedings to obtain both injunctive relief and a declaration that, first, the provincial Crown held clear title to the lands in question and, second, the Indians had no interest in those lands. The Foundation counterclaimed, seeking a declaration of quiet title on the ground that the Temagami had a better right to possession by virtue of their aboriginal rights in the land. The province responded that the Temagami had no aboriginal rights in relation to the land, or alternatively that any right they might have had was extinguished, either by treaty or by unilateral act of the sovereign. On these bases, the province had been successful before both Steele J at trial and the Ontario Court of Appeal. Speaking ***per curiam***, the Supreme Court of Canada dismissed the Foundation's appeal, but, in ***dicta***, observed the following regarding the Crown's fiduciary obligations:

> It is unnecessary, however, to examine the specific nature of the aboriginal right because, in our view, whatever may have been the situation upon the signing of the Robinson-Huron Treaty, that right was in any event surrendered by arrangements subsequent to that treaty by which the Indians adhered to the treaty in exchange for treaty annuities and a reserve. ***It is conceded that the Crown has failed to comply with some of its obligations under this agreement, and thereby breached its fiduciary obligations to the Indians.*** These matters currently form the subject of negotiations between the parties. It does not alter the fact, however, that the aboriginal right has been extinguished.[46]

Robert Reiter offered this view of the significance of this decision in his text entitled *The Law of First Nations*:

> The ***Bear Island*** case stands as an extension of the concept of fiduciary duty which was originally formulated in ***Guerin***. In ***Guerin***, the duty was limited to the administration of surrendered lands. In ***Sparrow***, a general statement of intent was made with respect to the Crown's obligations as to honouring aboriginal rights. With ***Bear Island***, the fiduciary concept was extended to include the Crown's obligation to honour treaty rights. The honouring of treaty and aboriginal rights is not a strict obligation as in the ***Guerin*** case, rather, the obligation is extended and underwritten as a political and moral obligation which is now being defined piecemeal through case law.

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[45] ***Ontario (Attorney General) v. Bear Island Foundation***, [1991] 2 SCR 570, [1991] 3 CNLR 79.

[46] ***Ontario (Attorney General) v. Bear Island Foundation***, [1991] 2 SCR 570 at 575, [1991] 3 CNLR 79.

> The case underwrites treaty rights. Notwithstanding the ruling on the extinguishment of aboriginal rights through the treaty making process, the case provides a new means for acquiring Indian objectives, (e.g., on the breach of a treaty right, the band may, through the enforcement of the fiduciary obligation, acquire an interest roughly equivalent to that associated with aboriginal title or may have specific treaty obligations enforced).[47]

At the same time, it is important to note that, in a 1994 case – ***Québec (Attorney General) v. Canada (National Energy Board)***[48] – the Court also explicitly recognized that there are limits on the Crown's fiduciary obligations to Indian bands. Following lengthy public hearings including extensive submissions by the Grand Council of Crees (of Québec) and the Cree Regional Authority (the "appellants"), the National Energy Board issued licences to Hydro-Québec to export electrical power to the states of New York and Vermont. The appellants claimed, among other grounds of appeal, that the board was an agent of government and a creation of Parliament and thus owed the appellants, by virtue of their status as aboriginal peoples, a fiduciary duty extending to the decision-making process used in considering applications for export licences. According to the appellants, this meant that the board was required to go beyond principles of natural justice by compelling that all information necessary for the appellants to make their case against the applications be disclosed to ensure their full and fair participation in the hearing process. The appellants further argued that the Board was obliged to take their best interests into account when making its decision.

On behalf of the entire Court, Iacobucci J rejected these submissions, concluding that, since the board was a quasi-judicial tribunal, it was not required to make its decision in the best interests of the Grand Council and the Regional Authority. However, his reasons also applied to the fiduciary relations of the Crown and aboriginal peoples in more general circumstances:

> It is now well settled that there is a fiduciary relationship between the federal Crown and the aboriginal peoples of Canada: ***Guerin v. The Queen***, [1984] 2 S.C.R. 335. Nonetheless, it must be remembered that ***not every aspect of the relationship between fiduciary and beneficiary takes the form of a fiduciary obligation***: ***Lac Minerals Ltd. v. International Corona Resources Ltd.***, [1989] 2 S.C.R. 574. The

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[47] Robert Reiter, ***The Law of First Nations*** (Edmonton: Juris Analytica Publishing, 1996), 255.

[48] ***Québec (Attorney General) v. Canada (National Energy Board)***, [1994] 1 SCR 159 (hereafter referred to in the text as the "***National Energy Board*** case").

> nature of the relationship between the parties defines the scope, and the limits, of the duties that will be imposed.[49]

The following year, in ***Blueberry River Indian Band v. Canada (Minister of Indian Affairs and Northern Development)*** (hereafter referred to in the text as the ***Apsassin*** case),[50] the Court considered the existence of a fiduciary relationship between the Crown and the Beaver Band of Indians in the context of an inadvertent surrender of mineral rights during the course of a broader surrender of reserve land for the settlement of war veterans. In her reasons, McLachlin J asked

> whether on the particular facts of this case a fiduciary relationship was superimposed on the regime for alienation of Indian lands contemplated by the *Indian Act*.
>
> Generally speaking, a fiduciary obligation arises where one person possesses unilateral power or discretion on a matter affecting a second "peculiarly vulnerable" person: see *Frame v. Smith*, [1987] 2 S.C.R. 99; *Norberg v. Wynrib*, [1992] 2 S.C.R. 226; and *Hodgkinson v. Simms*, [1994] 3 S.C.R. 377. The vulnerable party is in the power of the party possessing the power or discretion, who is in turn obligated to exercise that power or discretion solely for the benefit of the vulnerable party. A person cedes (or more often finds himself in the situation where someone else has ceded for him) his power over a matter to another person. The person who has ceded power trusts the person to whom power is ceded to exercise the power with loyalty and care. This is the notion at the heart of the fiduciary obligation.[51]

The reasons of both Gonthier and McLachlin JJ suggest that, in the proper circumstances, the Crown might owe fiduciary duties to a band in the pre-surrender context – in particular, where the band's understanding of the terms of the surrender is inadequate, where the conduct of the Crown has tainted the dealings in a manner that makes it unsafe to rely on the band's understanding and intention, where the band has ceded or abnegated its decision-making authority to or in favour of the Crown in relation to the surrender, or where the surrender is so foolish or improvident as to be considered exploitative. Nevertheless, on the facts in ***Apsassin***, the Court concluded that Canada had not breached any pre-surrender fiduciary obligations to the Band. However, the Court did find that Canada's usual practice was to retain the mineral rights when granting title to the surface, commenting that a reasonable person does not (a) inadvertently give away a potentially valuable asset that has already demonstrated earning potential or (b) give away for no consideration that which it will cost him nothing to keep and which may one day possess value, however remote the possibility. Canada's failure to retain the mineral rights, or to take available steps to reacquire those rights, thus amounted to a post-surrender breach of fiduciary obligation.

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[49] *Québec (Attorney General) v. Canada (National Energy Board)*, [1994] 1 SCR 159 at 183. Emphasis added.

[50] *Blueberry River Indian Band v. Canada (Minister of Indian Affairs and Northern Development)*, [1995] 4 SCR 344.

[51] *Blueberry River Indian Band v. Canada (Minister of Indian Affairs and Northern Development)*, [1995] 4 SCR 344 at 371, McLachlin J.

In light of the foregoing cases we are secure in concluding that there is a fiduciary relationship between the federal Crown and the aboriginal peoples of Canada. That being said, we must acknowledge the comments of Iacobucci J in the *National Energy Board* case that "not every aspect of the relationship between fiduciary and beneficiary takes the form of a fiduciary obligation." However, given the solemn obligations embodied in Canada's treaties with First Nations, and further given the fundamental importance of the treaties in defining the relationship between Canada and the Indians, it would seem to follow that the Crown's undertaking in the treaties to provide reserve land comprises one aspect of the relationship that takes the form of a fiduciary obligation.

Conduct-Based Breaches of Fiduciary Duty

In the preceding analysis we have discussed how fiduciary obligations owed by Canada to First Nations arise from the trust-like nature of the relationship between the parties. In this sense of Canada's fiduciary duty, the question of breach in the context of allotting reserve land is measured by the standard prescribed in the treaty. Canada's historical and legal obligation in this case was to provide Long Plain with sufficient reserve land to satisfy the Treaty 1 formula of "one hundred and sixty acres for each family of five, or in that proportion for larger or smaller families." The treaty could not be clearer. Since Canada fell short of the required acreage, that fact alone results in a breach of the terms of the treaty. It also constitutes, as we have concluded, a breach of Canada's fiduciary duty to live up to its treaty obligations. The nature of Canada's *conduct*, whether inadvertent or otherwise, is not a significant consideration in simply establishing the existence of the *breach* of duty.

However, quite apart from the duties relating to reserve land arising from treaty and the general trust-like relationship between Canada and First Nations, it seems clear to us that separate causes of action for fiduciary breach *could* arise as a result of Canada's conduct in its dealings with First Nations. Thus, for example, in *Guerin*, the Crown's representatives were held to have breached a fiduciary duty to the Musqueam Band when they proceeded with the lease on the terms proposed by the golf club without referring the question back to the Band for a decision. Similarly, in *Apsassin*, Canada's failure to retain the inadvertently conveyed mineral rights, or to reacquire those rights using available means, amounted to a breach of fiduciary obligation. Although the Court concluded that fiduciary breaches occurred, in neither case did the breaches stem from Canada's failure to comply with the terms of a treaty or other agreement. Rather, those breaches sprang from Canada's failure to act with the degree of fidelity, honesty, and effort required to satisfy its duty of loyalty to the bands in those cases.

It would seem to us to be unnecessary for a First Nation to establish a conduct-based breach of fiduciary obligation to maintain a cause of action for loss of use. Since the failure on Canada's part to deliver treaty land in a timely way is certainly a breach of the treaty and arguably also a breach of the general fiduciary duty owed in relation to Indian title, the cause of action is already amply substantiated. Indeed, even if we are incorrect in our conclusion that a failure to provide the full measure of treaty land amounts to a breach of a general fiduciary obligation, the existence of a cause of action based upon breach of treaty alone is incontrovertible. Thus, a third basis for the cause of action seems redundant.

We wish to be clear, however, in stating our belief that the full facts of each treaty land entitlement case, viewed in their proper historical context, are of fundamental importance in assessing the *quantum of compensation* to which a band is entitled. In that regard, Canada's conduct over the course of the entire historical time period is especially relevant. More will be said about this in the portion of our report entitled "Principles of Compensation."

Therefore, in this case, given our finding that the facts have already disclosed a breach of treaty and a breach of Canada's trust-like obligation to comply with the terms of Treaty 1, we do not find it necessary at this point to go into the question of whether Canada's conduct amounted to a further basis for concluding that a breach occurred. Moreover, in light of the parties' decision to proceed by means of the Joint Statement of Agreed Facts and to direct the Commission to refrain from making further findings of fact, we do not have enough information in any event to conclude definitively whether Canada's actions in setting apart Long Plain's reserve constituted a conduct-based breach of fiduciary duty. Subject to our comments below regarding Canada's submissions that the shortfall was inadvertent, we will refrain from making any observations regarding the parties' conduct until the second stage in this inquiry.

Defences

Notwithstanding our view that a treaty land entitlement shortfall in and of itself gives rise to a breach of treaty and a breach of fiduciary duty, we must consider certain defences that, in Canada's submission, preclude a finding of breach in this case. Essentially, Canada tenders three defences:

(a) that it has not breached Treaty 1 because the treaty does not set any firm time limit within which treaty land must be set aside;

(b) that there should be no finding of breach if Canada's performance is measured not by today's standards but by standards that would have been appropriate in 1876; and

(c) that the shortfall resulted from mere inadvertence or "honest mistake," which should not be considered sufficient to ground a finding that Canada breached its obligations to the Band.

We will address each of these defences in turn.

No Duty to Provide Land at a Specified Date

Canada submits that Long Plain's position "to a large extent either succeeds or fails on the characterization of 1876 and whether or not Canada was in breach of a duty at that time."[52] In counsel's view, the language of Treaty 1 demonstrates that the parties did not intend that Canada would provide bands with reserve lands at a specified date. Rather, the words "Her Majesty the Queen hereby *agrees* and *undertakes* to lay aside and reserve for the sole and exclusive use of the Indians the following tracts" indicate a need for *future* events – specifically, the precise description of the reserve boundaries by means of a survey, and the acceptance of the reserve by the band – before a reserve can be said to have been created.[53] Canada contends that, (a) since there was no obligation to set apart reserve lands at a specified date, (b) since it showed that it was ready and willing to put things right when the shortfall was discovered in the late 1970s, and (c) since it eventually entered into the Settlement Agreement with Long Plain, there was no breach of any obligation to the First Nation in 1876 or at all.[54]

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[52] ICC Transcript, October 17, 1997, p. 127 (Perry Robinson).

[53] Submissions on Behalf of the Government of Canada, September 26, 1997, p. 5.

[54] Submissions on Behalf of the Government of Canada, September 26, 1997, p. 13; ICC Transcript, October 17, 1997, p. 135 (Perry Robinson).

Long Plain dismisses Canada's position as "specious" and "unseemly." Instead, the First Nation counters, the parties more likely intended that the reserve should be created as soon as possible or at least within a reasonable time after the treaty was executed.[55]

The essence of Canada's position as we understand it is that the Crown was not in breach of either the terms of Treaty 1 or any other obligation or duty to the Band because there was no requirement in the treaty to set apart reserve lands at any specified date. We are not persuaded by this argument. The process of consummating treaties between Canada and the aboriginal peoples of the prairies was fundamental to the settlement of the west. We are not prepared to give credence to an interpretation of those treaties that would lead to a conclusion that Canada did not have an obligation to carry forward with the full implementation of the allocation of reserve lands in a timely way. Whether Canada's response has been "timely" will vary from case to case and may depend in part on the conduct of the band itself. For example, the Commission is aware of instances where, following execution of a treaty, members of a band have specifically asked *not* to have a reserve set apart until some time in the future when they would be ready to settle, or have made no request for reserve land at all. In such cases, although the *equitable obligation* to provide treaty land would have arisen upon execution of the treaty, there may well not be a *breach* of the treaty until Canada is asked to provide treaty land and fails to do so within a reasonable period of time. It also warrants emphasis that, in many cases, band composition and membership were fluid and, in some cases, unascertainable as aboriginal peoples adapted to a new agricultural way of life throughout the course of the 19th century; in such cases, Canada's failure to deliver the full treaty land entitlement might only be disclosed through modern methods of paylist analysis. In other circumstances, Canada has defaulted in its obligation to deliver up land in the face of a band's repeated requests. Stated simply, each and every treaty land entitlement case is different and requires a detailed historical review of the facts giving rise to the claim.

In this case, Canada was asked to set apart a separate reserve for Short Bear and his followers shortly after the 1876 revision to Treaty 1, and did so. However, although Canada's initial *response* to Short Bear's request was timely, its provision of the full measure of treaty land was *not*. Once it undertook to set apart a reserve it must also be considered to have undertaken to exercise ***reasonable diligence, skill, and care*** in doing so – ***in 1876***. Clearly, the First Nation's full treaty land entitlement was not set apart at that time, and there is no evidence before us to suggest that Short Bear asked for anything less. Indeed, if such a request had been made, there would undoubtedly be no need for this inquiry. That being said, we understand the difficulties inherent in the land selection process in the late 19th and early 20th centuries, and we are not suggesting that the selection process may not have taken a number of years, or even decades. However, Canada's failure to provide the full measure of treaty land in this case until 118 years after the fact falls short of any reasonable standard of timeliness.

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[55] Rebuttal Submissions on Behalf of the Long Plain First Nation, October 8, 1997, p. 18.

Performance Not to Be Measured by Today's Standard

Canada also suggests that, when the Commission considers the actions of Canada's representatives in 1876, it must assess their use of the annuity paylist to establish the size of IR 6 from the perspective of 1876 and not with the benefit of hindsight using present-day sophisticated paylist analysis.[56] From the perspective of 1876, Canada initially contends that no breach occurred. In the alternative, counsel argues that, if a breach *did* occur, and assuming that loss of use is compensable under the Specific Claims Policy, then the appropriate shortfall population should be 197 because, according to paragraph 8 of the Joint Statement of Agreed Facts, this is the figure that surveyor Lestock Reid apparently derived when he set apart the reserve. In the further alternative, Canada argues that the shortfall population should be 205, reflecting the figure of 223 that formed the basis of the 1994 Settlement Agreement less the 18 absentees and arrears payees of whom Reid could not have known in 1876. According to counsel, Reid's actions must be evaluated on the basis of whether he acted with the prudence of a man managing his own affairs.[57]

Long Plain in rebuttal submits that the breach was *Canada's* breach and not solely the responsibility of Lestock Reid.[58] Counsel further argues that, "even if ... the Band had been provided with sufficient land for the 209 on the list in 1876, Canada would still have breached the treaty and its fiduciary duty to the band because it had it within its capacity to determine the correct figure ([including] 15 arrears payees and 3 absentees) and had undertaken to do so to this very Claimant."[59]

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[56] Submissions on Behalf of the Government of Canada, September 26, 1997, p. 19.
[57] Submissions on Behalf of the Government of Canada, September 26, 1997, p. 19.
[58] Rebuttal Submissions on Behalf of the Long Plain First Nation, October 8, 1997, p. 15.
[59] Rebuttal Submissions on Behalf of the Long Plain First Nation, October 8, 1997, p. 17.

Moreover, since the dominion land surveys had already marked out the townships in the Long Plain area by the time Reid and Short Bear met to select the reserve lands, counsel for the First Nation asserts that there never really has been a survey of the Long Plain reserve at all:

> What we have instead of – instead of a survey extracting a parcel and identifying it and confirming it, we have a surveyor going out and saying with reference to a prior existing dominion land survey, these sections will now comprise the reserve. There never was a survey of the reserve as such, so there is no date of first survey. That's one thing that goes out the window on the facts of this claim. There's no date of first survey. There may be a date of location or identification of the reserve, but we cannot use the traditional language of DOFS....
>
> ... back then the only things that were done to establish Long Plain reserve number 6 were Reid drawing a line on an existing dominion land survey map in 1876;[60] and two, this Order-in-Council [PC 2876 dated November 21, 1913].[61]
>
> This Order-in-Council doesn't even say this is now a reserve. Keep in mind that what happened in 1872 was that the dominion land survey system was imposed on this part of the world. A dominion land survey was done, and all this Order-in-Council does is remove Long Plain land described under paragraph 2 from the operation of the Dominion Lands Act. That's all this Order-in-Council does. It doesn't declare there's a reserve. It doesn't create one. It doesn't make reference to the Indian Act. All it says is the land, the 17 square miles of Long Plain is removed from the operation of the Dominion Land Act....
>
> ... administratively what is happening in the establishment of the Long Plain reserve number 6 is that government is approaching this thing, is approaching the reserve issue not from the standpoint of performance of a duty to the First Nation, but just sort of cleaning up administratively how the Dominion Lands Act is going to operate in relation to this hole that's now created by Lestock Reid and Short Bear having gone out and identified where Long Plain number 6 is going to be.[62]

In our view, the position being advanced by Canada is certainly relevant to the determination of the compensation to which the First Nation is entitled, but it is not relevant to the question of whether Canada was in breach of Treaty 1 or in breach of its trust-like fiduciary obligations to Long Plain. In other words, in the second stage of this inquiry, if required to determine compensation, Canada can argue that damages of a certain quantum do not flow from its failure to allocate the appropriate quantum of treaty land because Canada "did not know" that there was an outstanding entitlement. Canada might even argue that a First Nation's entitlement to compensation for loss of use is circumscribed until such time as Canada knew or should reasonably have known of the existence of an arguable claim. However, the fact is that Canada is in breach of the terms of Treaty 1 because it failed to provide the proper quantum of land – whether it knew this or not. The breach flows from Canada's failure to provide the land, not from its knowledge that it is in default. This is so, in our view, whether the basis of liability is breach of treaty, breach of fiduciary obligation, or both.

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[60] Dominion Lands Office, *Plan of Township No. 10, Range 8, West of First Meridian*, surveyed by C.J. Bouchelle, March 1872; approved and confirmed by J.S. Dennis, Surveyor General, June 1, 1873 (ICC Exhibit 6).

[61] Order in Council PC 2876, November 21, 1913 (ICC Exhibit 5).

[62] ICC Transcript, October 17, 1997, pp. 57 and 59-60 (Rhys Jones).

On the facts in this case, however, we take the view that Canada must be considered to have failed in meeting its obligations regardless of whether the perspective is from today or 1876. Paylist analysis shows that the 1876 population of the Long Plain First Nation was 223 (including absentees and arrears payees), whereas the base paylist population was 209. The "reduction exercise" used by Lestock Reid to determine Long Plain's share of the 25 square mile area under Treaty 1 to be divided among Yellowquill, Short Bear, and the White Mud people under the 1876 revision to Treaty 1 apparently yielded a population of 197 for Short Bear's band[63] – the figure that Canada suggests is the information Reid had when he conducted the survey. The largest number of whom Reid could have known in 1876, according to Canada, was 205, being the treaty land entitlement population of 223 less 18 absentees and arrears payees of whom Reid could not have known. Yet the area allocated to the Band in 1876 under the Treaty 1 formula of 32 acres per person was 5303 acres – *sufficient land for only 165 people*. There is no evidence to indicate why only this limited area was surveyed or why Canada failed until the 1970s to identify that a shortfall had occurred. Although Reid might be forgiven for failing to allocate reserve land for 18 absentees and arrears payees of whose existence he was unaware, that does not excuse Canada from reviewing its files to ensure that, in the first instance, Long Plain had received its full allotment for those individuals of whom Reid *was* aware. This was a very substantial shortfall: it is not the sort of case referred to by Juliet Balfour in her letter of December 17, 1992, to former Chief Peter YellowQuill, when she commented that "it is only through the sophistication of contemporary research that First Nations and governments are even aware that there may have been a DOFS shortfall."[64]

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[63] Joint Statement of Agreed Facts, Long Plain First Nation Treaty Land Entitlement Loss of Use Claim, August 8, 1997, p. 2, para. 8 (ICC Exhibit 2).

[64] Juliet Balfour, Negotiator, Treaty Land Entitlement Branch, Indian and Northern Affairs Canada, to Chief Peter YellowQuill, Long Plain First Nations Tribal Council, December 17, 1992, p. 3 (ICC Exhibit 2, Schedule "G").

The only explanation offered by counsel for Canada is inadvertence or "honest mistake," and we will consider that issue shortly. We would emphasize that it remains open to Canada to argue at the second stage of this inquiry, if required, that its actions in setting apart land for only 165 people were defensible in the circumstances such that compensation for the breach might be limited in accordance with the principles we will discuss below.

With regard to the First Nation's suggestion that there was no first survey, but merely an identification of reserve lands by reference to a pre-existing dominion land survey, we acknowledge that there was no survey undertaken specifically for Long Plain. We also recognize that the comments in our report on the Kahkewistahaw treaty land entitlement inquiry might be narrowly construed as requiring a band-specific survey as part of the process for creating a reserve.[65] That report dealt with a situation where there was no preceding dominion land survey in relation to the reserve lands.

However, it is our view that, where a dominion land survey has already been undertaken, it is not necessary to conduct another survey for Canada and a band to be able to identify the land desired for the band's reserve and for the parties to reach a consensus that the land so identified constitutes the reserve for the purposes of the treaty. Canada clearly considered that IR 6 comprised Long Plain's reserve under Treaty 1, as can be seen from the Order in Council removing those lands from the operation of the *Dominion Lands Act*:

> WHEREAS Subsection (a) of Section 76 of the Dominion Lands Act, 1908, provides that the Governor in Council may withdraw from the operation of the Act, subject to existing rights as defined or created thereunder, *such lands as have been or may be reserved for Indians*.
>
> THEREFORE His Royal Highness the Governor General in Council is pleased to Order that *the lands comprised within the following reserves* shall be and the same are hereby withdrawn from the operations of the Dominion Lands Act....[66]

Long Plain's IR 6 is among the lands enumerated in the Order in Council. Likewise, there is no evidence before the Commission to suggest that the First Nation has ever disclaimed IR 6 as its reserve.

Although it is unlikely that the date of a dominion land survey will have relevance in terms of establishing a band's date of first survey, that is not an issue that requires our attention in this inquiry. All that need be said here is that the fact that Canada did not undertake a separate survey of the Long Plain reserve should not, in and of itself, be considered a breach of Canada's treaty obligations to the First Nation.

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[65] Indian Claims Commission, *Kahkewistahaw First Nation Treaty Land Entitlement Inquiry* (1998), 6 ICCP 21 at 79-80.

[66] Order in Council PC 2876, November 21, 1913 (ICC Exhibit 5).

Mere Inadvertence or Honest Mistake Insufficient to Ground Breach of Duty

In his oral submissions before the Commission, counsel for Canada stated:

> [G]iven that [Lestock] Reid has obviously used such care in the case of Swan Lake and in White Mud and his figures do add up, we're left with a situation for Long Plain where there's no real explanation why he provided an amount of land that's even less than the 197 figure that he was obviously using.... [T]here's no suggestion at all of negligence per se in the carrying out of their duty. It just appears to be a mistake, and I suggest that there are legal consequences that flow from that.[67]

What are those consequences? Counsel argues that, should the Commission conclude that Canada has failed through mistake or inadvertence to provide Long Plain with the full measure of its treaty land entitlement, such a finding may be insufficient to establish a breach of duty.[68] In counsel's submission, based on fiduciary principles said to have been established in *Apsassin*, "absent any lack of the exercise of 'due care, consideration and attention'" on Canada's part, *mere inadvertence* and a *lack of knowledge* that the "best interests" of a First Nation may have been compromised may not be enough to warrant a finding that there has been a breach of duty.[69] Counsel contends that the shortfall in this case was inadvertent, and because Canada only learned of the shortfall in the 1970s and then proved itself ready and willing to fulfill its obligations, there was no breach of Canada's duty to provide reserve land.[70] By way of contrast, had Canada refused to negotiate when it became aware of the shortfall, counsel conceded that such refusal "would have constituted a breach."[71]

Long Plain counters that, despite Canada's suggestion that the shortfall occurred as a result of inadvertence, "the fact is that there is no written record of why Reid used the population figure of 197."[72] Since Canada was

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67 ICC Transcript, October 17, 1997, pp. 123 and 125 (Perry Robinson).
68 Submissions on Behalf of the Government of Canada, September 26, 1997, p. 14.
69 Submissions on Behalf of the Government of Canada, September 26, 1997, p. 16.
70 Submissions on Behalf of the Government of Canada, September 26, 1997, p. 16.
71 ICC Transcript, October 17, 1997, p. 126 (Perry Robinson).
72 Rebuttal Submissions on Behalf of the Long Plain First Nation, October 8, 1997, p. 12.

obliged by the treaty to provide Long Plain with its full measure of treaty land, it is not appropriate, in counsel's submission, to say that there is no breach unless the First Nation discovers the failure to perform and asks Canada to rectify it.[73] Moreover, the First Nation contends that Canada has had a number of opportunities to determine the accuracy of Long Plain's reserve allotment and its failure to do so amounts to a "reckless or callous disregard of its duty."[74]

The Commission notes in Canada's submission the statement that, ***absent any lack of due care, consideration and attention by the fiduciary***, a lack of knowledge that the best interests of a First Nation may have been compromised may be insufficient to ground a finding of breach of duty. As we have already observed, we have no evidence before us to suggest that Short Bear asked for anything less than the full allotment of reserve land for his band under Treaty 1 in 1876. That being so, Canada asks us to conclude that, because the land allocations to the other two factions of the Portage Band indicate that Reid ***did*** exercise due care, consideration, and attention in those cases, the failure to provide Long Plain with its full allotment of treaty land must have resulted from mere inadvertence. We take Canada's position to be that Reid's error was merely inadvertent because he ***was*** exercising due care, consideration, and attention, whereas the same error ***in the absence of*** such due care, consideration, and attention might amount to a remediable breach.

However, regardless of the degree of Reid's care, consideration, and attention, Canada's submissions on this point still do not come to grips with the simple fact that, following the survey, Long Plain was left with a shortfall of treaty land. In our minds, that constitutes a breach of treaty. Conduct ***per se*** is not relevant to the issue of whether the obligation to provide treaty land under the terms of the treaty has been satisfied. Expressed in another way, it is our conclusion that Canada is in breach of the terms of a treaty if it has failed to deliver the appropriate quantum of land to which a First Nation is entitled under the terms of a treaty within a reasonable time of being asked to do so. That Canada may be unaware of a shortfall in the land allocated cannot vitiate the fact that Canada is in breach of the terms of the treaty. Similarly, the fact that Canada may have a very good explanation as to why the land has not been allocated does not mean that Canada is not in breach of the treaty or liable for damages or compensation flowing from that breach.

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[73] ICC Transcript, October 17, 1997, pp. 159-60 (Rhys Jones).

[74] Rebuttal Submissions on Behalf of the Long Plain First Nation, October 8, 1997, pp. 12-13.

The breach resides in the fact that the appropriate amount of land has not been provided in a timely way in accordance with the terms of the treaty. We therefore reject Canada's argument on this point.

That being said, if we were required to make a determination based solely on the Joint Statement of Agreed Facts, we would lean to the conclusion that some form of conduct-based breach of Canada's fiduciary obligations to the First Nation may have occurred, having regard for the extensive size of the shortfall in this case and the absence of any explanation. However, we see no evidence at this point to support Long Plain's argument that Canada callously and recklessly disregarded the First Nation's interests. True, Canada may have failed to exercise proper skill and care in setting apart the reserve, but there is no evidence before the Commission to suggest that the failure to provide Long Plain with its full measure of treaty land arose as a result of recklessness or any deliberate attempt to cheat the First Nation out of its proper entitlement. We see a distinction between Long Plain, which never received its full treaty land entitlement, and bands that may have received their full entitlements at the outset but then lost them through deliberate malfeasance by Canada's agents, such as we saw in the Kahkewistahaw and Moosomin surrender inquiries.

Nevertheless, we agree with counsel for Canada that, if the shortfall occurred because of inadvertence or honest mistake, as opposed to negligence or some degree of *mala fides*, then there *are* legal consequences. However, those consequences do not relate to the question of whether a *breach* occurred. The real significance of the distinction between "conduct-based" fiduciary breaches on the one hand and breaches of treaty and "treaty-based" fiduciary breaches on the other lies not in the question of *liability*, as Canada will be liable in either event, but in the *level of compensation* to which the First Nation will be entitled, as we will discuss below.

In this regard, we are mindful of the necessity of examining each case on its own facts, and our experience has shown that each treaty land entitlement case must be scrutinized with specific regard to the conduct of both Canada and the band vis-à-vis the setting aside of reserve lands. Thus, for example, compensation for loss of use may vary widely between, on the one hand, cases in which the shortfall arose from some deliberate or reckless conduct on Canada's part and, on the other, purely "research-driven" claims – situations in which Canada appeared to provide sufficient land for the members of a band based on the paylist in the year of first survey, but where later research has uncovered absentees or others of whom Canada could not have known at the time of survey and for whom no land has ever been set aside. In the middle is a grey area in which the present case may well fall, where Canada may not have realized there was a shortfall but perhaps should have.

For the moment, the Commission simply concludes that, as a result of Canada's failure to fulfill its treaty obligations, Long Plain has endured a shortfall in its allocation of treaty land. In our view, the First Nation has a valid claim, not only for the full quantum of treaty land but also for compensatory damages or restitutionary compensation flowing from the shortfall. The quantification of that entitlement is, however, very much at issue. For the moment, we conclude only that Canada's breach of treaty and fiduciary duty gives rise to a lawful obligation that invokes the compensation provisions of the Specific Claims Policy, and that loss of use is to some extent available as a part of that lawful obligation.

Loss of Use as Head of Damage Rather than Separate Claim

There is one other position advanced by Canada that requires comment at this time. In the course of Canada's negotiation of the Settlement Agreement and, to a lesser extent, in the course of this inquiry, Canada has taken the position that Long Plain's loss of use claim is separate and distinct from the treaty land entitlement claim that was accepted for negotiation in 1982. In other words, Canada sought to impose upon the First Nation a requirement to advance this loss of use claim through the specific claims process as a new matter requiring a separate acceptance for negotiation. This position was clearly expressed in Juliet Balfour's letter of December 17, 1992:

> First, loss of use will not be considered as a separate head of damage or compensation in the negotiation and conclusion of a TLE claim. *If a First Nation believes it has grounds for a loss of use claim, it has to be pursued as a separate matter*. This is a policy position of the Specific Claims/Treaty Land Entitlement Branch which has been consistently followed across the west. This policy will not be changed in the case of your claim....[75]

Similarly, Al Gross stated on February 23, 1993:

> During our recent TLE negotiations you raised the issue of compensation for loss of use for the shortfall acreage. We responded by indicating that Canada, based on its

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[75] Juliet Balfour, Negotiator, Treaty Land Entitlement Branch, Indian and Northern Affairs Canada, to Chief Peter YellowQuill, Long Plain First Nations Tribal Council, December 17, 1992, p. 1 (ICC Exhibit 2, Schedule "G"). Emphasis added.

> review of the law applicable to a TLE claim, is of the view that *loss of use is not a proper item for negotiation in the context of the TLE claim*. This is consistent with our position in the recently concluded framework agreement in Saskatchewan."[76]

The same position was repeated by Bruce Hilchey on March 18, 1993:

> At our meeting with you on January 20, 1993, the Federal TLE negotiating team verbally provided to the Band the proposed settlement which our team was prepared to recommend to our Minister to fully and finally satisfy the Band's outstanding TLE. However, at that meeting, you argued that loss of use should be considered in any settlement. In response, we explained our position on loss of use based on the legal advice we had received. *Our position was and still is that loss of use must be actually proven based on legal principles, and this must be done separately from the TLE claim.*[77]

In the Commission's view, loss of use is a *head of damage* that must be considered in the context of the treaty land entitlement claim from which it springs. Generally speaking, it is *not* a *separate* claim or lawful obligation. It arises out of the same factual circumstances as a treaty land entitlement claim and therefore should not require a separate acceptance for negotiation by Canada. In the present case, Canada acknowledged the outstanding treaty land entitlement of the Long Plain First Nation in Minister John Munro's 1982 letter, and nothing further should be required for loss of use to be included as an item of negotiation. We consider it inappropriate for Canada to require the First Nation to submit a new claim for independent review and acceptance for negotiation in such circumstances. If, after confirming that a First Nation has an outstanding treaty land entitlement, Canada takes the position that loss of use is not compensable on the facts of a given case, it should be open to the First Nation to proceed directly to the Indian Claims Commission on the basis that it "disagrees with a decision of the Minister with respect to the compensation criteria that apply in the negotiation of a settlement."

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[76] Al Gross, Director, Treaty Land Entitlement Branch, Indian and Northern Affairs Canada, to Chief Peter Yellow-Quill, Long Plain First Nations Tribal Council, February 23, 1993, p. 1 (ICC Exhibit 2, Schedule "H"). Emphasis added.

[77] Bruce Hilchey, Negotiator, Treaty Land Entitlement Branch, Indian and Northern Affairs Canada, to Chief Peter YellowQuill, Long Plain First Nations Tribal Council, March 18, 1993, p. 1 (ICC Exhibit 2, Schedule "I"). Emphasis added.

PRINCIPLES OF COMPENSATION

The Commission has concluded that, until the 1994 Settlement Agreement resolved the issue of treaty land entitlement, Canada was in breach of the terms of Treaty 1 vis-à-vis the Long Plain First Nation because Canada failed to allocate in a timely way the full quantum of land required under the terms of that treaty. Canada may also have been in breach of its fiduciary duty to "live up to its treaty obligations." In our view, Canada was obliged, at a minimum, to fulfill the terms of Treaty 1 through the delivery of the full complement of land to which the First Nation was entitled. The essential question that follows is the compensation to which the First Nation is entitled as a result of Canada's delay. We have not been called upon in this inquiry to actually fix the amount of compensation payable, if any, but rather to address the general principles that apply in such a determination.

Our analysis must, by definition, begin with the Specific Claims Policy which sets forth the following general rule:

> As a general rule, a claimant band shall be compensated *for the loss it has incurred and the damages it has suffered as a consequence of the breach* by the federal government of its lawful obligations. This compensation will be based on *legal principles*."[78]

In this case the loss claimed to have been incurred is loss of use, and the Commission has already concluded that the First Nation has established the validity of its claim in terms of liability. As to whether loss of use is compensable in law, reference may be made at the outset to the following statement of principle by S.M. Waddams in *The Law of Damages*:

> Many kinds of legal wrongs cause a loss of property to the plaintiff. The commonest cases are negligence, destruction of goods, conversion, non-delivery by a seller, and loss by a carrier or bailee. Classified as legal wrongs, these instances seem to have little in common, crossing the borderline between contract and tort, negligence and trespass, and sale and service contracts. However, from the point of view of compensation, they all raise a single issue: *how to provide in money a substitute for property that the plaintiff does not have, but would have had but for the defendant's wrong.*
>
> *It is common in such cases that the plaintiff complains not only of the loss of property but also of the loss of its use. Had the wrong not been done, the plaintiff would have had, at the time of the complaint, not only capital wealth represented*

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[78] *Outstanding Business*, 30; reprinted (1994), 1 ICCP 171 at 184. Emphasis added

> *by the property, but an accretion to wealth represented by profitable use of the property*. It is often difficult, as the subsequent discussion will show, to draw a clear line between these two claims, for the capital value of property reflects the value of its anticipated use. Thus, if instant reparation could be made for the plaintiff's loss, and a perfect substitute instantly acquired, there would never be a claim for loss of use. But reparation for legal wrongs is never made instantly, and substitutes are rarely perfect. Consequently, *compensation may be usefully regarded as containing two elements: a substitute for loss of the value of the property and a substitute for the loss of the opportunity to use it.*[79]

It is significant that courts of equity have long had the requisite jurisdiction to direct specific performance and to award damages, either in addition to or in substitution for specific performance. In the narrow context of a failure to deliver up real property, that jurisdiction to award damages extends to both damages arising from a deficiency in the quantum of land provided and damages flowing from late performance. The concept there at work is no different in import from that referred to by the shorthand term loss of use in treaty land entitlement claims.

It is also important to note that the leading case in relation to fiduciary obligations – *Guerin* – itself discloses that the courts are prepared to grant compensation for loss of use or lost opportunity. There, Collier J at trial awarded the Musqueam Band compensation of $10 million, a result that met with the approval of Dickson and Wilson JJ on the ultimate appeal to the Supreme Court of Canada. Wilson J stated:

> It seems to me that what the trial judge was doing once he rejected the value of a golf club lease (either the one the Band authorized or one which could be described objectively as "fair") as the value against which the Band's loss was to be measured was to put a value as of the date of trial on the Band's *lost opportunity* to develop the land for residential purposes and assess the Band's damages in terms of the difference between that figure and the value of the golf club lease. Is this a proper approach to compensation for breach of trust?
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> ...
>
> Since the lease that was authorized by the Band was impossible to obtain, the Crown's breach of duty in this case was not in failing to lease the land, but in leasing it when it could not lease it on the terms approved by the Band. The Band was thereby deprived of its land and any use to which it might have wanted to put it. Just as it is to be presumed that a beneficiary would have wished to sell his securities at the highest price available during the period they were wrongfully withheld from him

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[79] S.M. Waddams, *The Law of Damages*, 2nd ed. (Aurora, Ont.: Canada Law Book Inc., 1991), ¶ 1.10 and 1.20. Emphasis added.

> by the trustee (see *McNeil v. Fultz* (1906), 38 S.C.R. 198), so also it should be presumed that the Band would have wished to develop its land in the most advantageous way possible during the period covered by the unauthorized lease. In this respect also the principles applicable to determine damages for breach of trust are to be contrasted with the principles applicable to determine damages for breach of contract. In contract it would have been necessary for the Band to prove that it would have developed the land; in equity a presumption is made to that effect: see Waters, *Law of Trusts in Canada*, at p. 845.
>
> I cannot find that the learned trial judge committed any error in principle in approaching the damage issue on the basis of a lost opportunity for residential development.[80]

Dickson J concurred that the judgment of Collier J disclosed no error in principle.[81]

Justice Wilson's decision to apply principles of restitution to compensate the Band for its lost opportunity was described by McLachlin J in these terms in *Canson Enterprises Ltd. v. Boughton & Company*:

> Applying the reasoning of restitution, Wilson J. concluded that the Crown in failing to consult the Band and obtain further instructions on the lease had committed a breach of trust. *The Crown was required to compensate the Band for the value of what was lost because of the breach, namely, the opportunity to enter into a more favourable arrangement. The value of this lost opportunity was based* not on the common law tort or contract measure of what might have reasonably been foreseen at the time, but *on the equitable approach of looking at what actually happened to values in later years.*[82]

It can therefore be seen that there is a strong basis for concluding that, as a matter of legal principle, compensation for lost opportunity or loss of use is available in cases in which Canada has deprived a band of the use of its reserve entitlement over an extended period of time.

That being said, Canada contends that there are several bases on which *Guerin* can be distinguished from the inquiry at hand. We disagree. First, as we have seen, counsel for Canada argues that it is important to the First Nation to characterize Canada's duty in this case as "fiduciary," as it was in *Guerin*, to make any breach of duty "readily discernible" and to import equitable principles regarding the assessment of damages.[83] The implication of Canada's submission is that different standards of conduct and principles of compensation apply to a "mere" breach of treaty than to a breach of fiduciary obligation. Given that the Commission has already concluded that Canada's breach in this case constituted both a breach of treaty *and* a breach of fiduciary obligation, this alleged distinction presumably falls away. However, as we will discuss below, even if we are wrong in concluding that the breach of treaty in this case also amounted to a breach of fiduciary duty, we nevertheless consider that breaches of treaty also attract the equitable jurisdiction of the courts.

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[80] *Guerin v. The Queen*, [1984] 2 SCR 335 at 359, 362-63, [1984] 6 WWR 481, 13 DLR (4th) 96, [1985] 1 CNLR 120, Wilson J. Italic emphasis added.

[81] *Guerin v. The Queen*, [1984] 2 SCR 335 at 391, [1984] 6 WWR 481, 13 DLR (4th) 96, [1985] 1 CNLR 120, Dickson J.

[82] *Canson Enterprises Ltd. v. Boughton & Company*, [1991] 3 SCR 534 at 551, McLachlin J. Emphasis added.

Second, *Guerin* dealt with loss of use in the context of a *surrender* rather than in the circumstances of a *treaty land entitlement* shortfall. Reserve land that had been specifically allocated to the Musqueam Band was *given up* for the purpose of the long-term lease to the golf club, whereas in the present case Long Plain *never received* the shortfall land in the first place. For its part, Canada attaches considerable significance to this distinction, as we will discuss below. However, we do not believe that there is any conceptual difference between a treaty land entitlement shortfall and a surrender in relation to the principles of compensation that govern a loss of use claim.

Third, the courts in *Guerin* based liability on the failure of the Crown's representatives to return to the Musqueam Band to discuss the terms of the leasing counter-proposal that were less favourable than the terms previously approved by the Band; instead, those representatives mistakenly concluded that it was within the Crown's discretion to decide what was in the best interests of the Band – *without* consulting Band members, and *knowing* that the Band had not approved the terms of the counter-proposal. There was thus an element of moral failure on the part of the Crown's representatives in *Guerin* that, in the absence of further evidence, we cannot conclude existed in this case. Indeed, counsel for Canada contends, as we will see, that the failure to provide Long Plain with its full measure of treaty land in this case resulted from mere inadvertence rather than any deliberate, reckless, or other wrongdoing by Canada's agents. In the Commission's view, any such differences, if found to be material following a full review of the facts, are relevant in determining the *quantum* of compensation to be awarded but *not* in deciding whether loss of use is *compensable* in the first place.

We will now consider these points more fully.

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[83] Submissions on Behalf of the Government of Canada, September 26, 1997, pp. 10-11.

Characterization of the Breach in Assessing Compensation

As we have seen, according to counsel for Canada, the reasons why it is important to the First Nation to characterize Canada's duty in this case as fiduciary are, first, to make any breach of the duty "readily discernible," since the higher standard of duty required of a fiduciary will be imposed, and, second, to import principles of fiduciary law regarding the assessment of damages.[84] Looking at the first of these arguments, we acknowledge that, at a conceptual level, a fiduciary may have to meet a higher *standard* than an individual who, although owing a duty, does not bear the fiduciary label.

However, in the case of a shortfall of treaty land, the duty is clearly spelled out in the terms of the treaty. Characterizing that duty as "fiduciary" does not change the nature of the obligation – namely, to provide a band with its full entitlement of treaty land in a timely way. Arguably, the standard of duty expected of Canada in fulfilling the terms of its treaties is higher than the standard of duty required of Canada as a fiduciary – the obligation expressed in the treaty is absolute, whereas the duty owed by a fiduciary is often expressed as one that demands only fidelity, honesty, and best efforts.

As for the argument that it is necessary to characterize Canada's duty as fiduciary to permit the Commission to import equitable principles of compensation to the assessment of damages, we strongly disagree. In our opinion, the remedies available in circumstances involving a treaty land entitlement shortfall – regardless of whether that shortfall is characterized as a breach of treaty or a breach of fiduciary obligation – must reflect the full equitable jurisdiction of the superior courts in this country.

We have already observed the Supreme Court of Canada's repeated recognition of the *sui generis* or "unique character both of the Indians' interest in land and of their historical relationship with the Crown."[85] In this context, it seems clear that a valid claim by an Indian band with regard to a shortfall in the allocation of its reserve lands constitutes a *sui generis*, enforceable obligation. It is our view that, at law, such a claim is clearly on a higher plane than a contractual obligation, but even if it amounts to a mere contractual obligation, it will attract the intervention of the courts of equity. We have no doubt that this type of obligation, being equitable in nature, can be enforced by the courts, either through an award of specific performance or, in circumstances in which specific performance may not be available, an award of, first, compensatory damages in lieu of the shortfall land, and, second, compensatory damages for late performance. One way – although not the only way – of measuring the latter form of damages is by means of a loss of use analysis. Ultimately, regardless of whether we conclude that the shortfall in the present case amounts to a breach of treaty or a breach of fiduciary duty, Canada's lawful obligation will be measured as the compensation or damages that a court can award under general principles of law and equity.

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[84] Submissions on Behalf of the Government of Canada, September 26, 1997, pp. 10-11.

[85] *Guerin v. The Queen*, [1984] 2 SCR 335 at 387, [1984] 6 WWR 481, 13 DLR (4th) 96, [1985] 1 CNLR 120, Dickson J.

The leading case from the Supreme Court of Canada – *Canson Enterprises* – provides very clear guidance on how that compensation should be calculated. It also demonstrates how the law relating to equitable compensation has evolved since *Guerin*. In *Canson Enterprises,* the Court addressed the question of compensation for which a solicitor should be liable when, in preparing a conveyance for a transaction, he failed to advise the purchasers of a secret profit made on a "flip" of the property in an intermediate transaction. The evidence showed that the purchasers would not have purchased the property had they been fully apprised of the situation. Following the purchase, the purchasers proceeded to develop the property but suffered substantial losses when piles supporting a warehouse forming part of the development began to sink, causing extensive damage to the building. When the soils engineers and the pile-driving company proved unable to cover the purchasers' losses, the purchasers defaulted on their mortgage and the mortgage company foreclosed. The purchasers commenced an action against the solicitor, alleging that the failure to disclose the secret profit was actionable as deceit or breach of fiduciary duty, and claiming that the solicitor must compensate for all the losses suffered, including those arising from the breaches by the soils engineers and the pile-driving contractor. However, these intervening breaches resulted in damages that the courts at all levels were reluctant to attribute to the conveying solicitor's failure to advise the purchasers of the profit made on the "flip" sale.

At the Supreme Court of Canada, La Forest J penned the plurality decision on behalf of four of the eight presiding justices, with Stevenson J adding a fifth concurring voice in separate reasons for judgment. La Forest J considered the solicitor's breach of fiduciary duty to be similar to the tort of deceit, and accordingly concluded that the purchasers would be adequately redressed by calculating compensation in accordance with tort principles – which, in deceit, "are considerably more liberal than normal tort or contract damages, in that ***unforeseeable and foreseeable damages*** are awarded."[86] He wrote:

> [I]n this particular area law and equity have for long been on the same course and whether one follows the way of equity through a flexible use of the relatively undeveloped remedy of compensation, or the common law's more developed approach to damages is of no great moment. *Where "the measure of duty is the same", the same rule should apply.... Only when there are different policy objectives should equity engage in its well-known flexibility to achieve a different and fairer result.*[87]

Clearly, La Forest J recognized the difference between the flexibility of equity, with its facility to devise remedies that effect restitution, and "the more restrictive aims of the common law in awarding damages for tort or breach of contract."[88] However, he considered that there are situations in which policy demands the application of equitable remedies:

> Where a situation requires different policy objectives, then the remedy may be found in the system that appears more appropriate. This will often be equity. Its flexible remedies such as constructive trusts, account, tracing and compensation must continue to be moulded to meet the requirements of fairness and justice in specific situations.[89]

Later, in *Hodgkinson v. Simms*, La Forest J further elaborated on his comments in *Canson Enterprises*:

> *Canson* held that a court exercising equitable jurisdiction is not precluded from considering the principles of remoteness, causation, and intervening act where necessary to reach a just and fair result. *Canson* does not, however, signal a retreat from the principle of full restitution; rather it recognizes the fact that a breach of fiduciary duty can take a variety of forms, and as such a variety of remedial considerations may be appropriate....
>
> Put another way, equity is not so rigid as to be susceptible to being used as a vehicle for punishing defendants with harsh damage awards out of all proportion to their actual behaviour. On the contrary, where the common law has developed a measured and just principle in response to a particular kind of wrong, equity is

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[86] Alan Pratt, "Fiduciary Principles and the Compensation Guidelines of 'Outstanding Business,'" unpublished paper, Toronto, January 1992, p. 13.

[87] *Canson Enterprises Ltd. v. Boughton & Company*, [1991] 3 SCR 534 at 586-87, La Forest J. Emphasis added.

[88] Alan Pratt, "Fiduciary Principles and the Compensation Guidelines of 'Outstanding Business,'" unpublished paper, Toronto, January 1992, p. 15.

[89] *Canson Enterprises Ltd. v. Boughton & Company*, [1991] 3 SCR 534 at 588, La Forest J. Emphasis added.

> flexible enough to borrow from the common law. As I noted in *Canson*, at pp. 587-88, this approach is in accordance with the fusion of law and equity that occurred near the turn of the century under the auspices of the old *Judicature Acts*.... Thus, properly understood *Canson* stands for the proposition that courts should strive to treat similar wrongs similarly, regardless of the particular cause or causes of action that may have been pleaded.[90]

McLachlin J in *Canson Enterprises* (Lamer CJ and L'Heureux-Dubé concurring) agreed in the result but on different grounds. She concluded that, because fiduciary duties spring from trust principles, very different considerations apply in awarding compensation for equitable breaches as opposed to damages for breaches at common law. As McLachlin J stated in that case:

> My first concern with proceeding by analogy with tort is that it overlooks the unique foundation and goals of equity. The basis of the fiduciary obligation and the rationale for equitable compensation are distinct from the tort of negligence and contract. In negligence and contract the parties are taken to be independent and equal actors, concerned primarily with their own self-interest. Consequently the law seeks a balance between enforcing obligations by awarding compensation and preserving optimum freedom for those involved in the relationship in question, communal or otherwise. The essence of a fiduciary relationship, by contrast, is that one party pledges itself to act in the best interest of the other. The fiduciary relationship has trust, not self-interest, at its core, and when breach occurs, the balance favours the person wronged. The freedom of the fiduciary is diminished by the nature of the obligation he or she has undertaken – an obligation which "betokens loyalty, good faith and avoidance of a conflict of duty and self-interest": *Canadian Aero Service Ltd. v. O'Malley*, [1974] S.C.R. 592, at p. 606. In short, equity is concerned, not only to compensate the plaintiff, but to enforce the trust which is at its heart.[91]

In Justice McLachlin's view, equity's added objective of ensuring that fiduciaries are "kept up to their duty" means that attempts to effect restitution through equitable compensation require an approach that is different from damages in tort or contract, which simply seek to recover actual and reasonably foreseeable damage.[92] She concluded:

> [T]he better approach, in my view, is to look to the policy behind compensation for breach of fiduciary duty and determine what remedies will best further that policy. In

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[90] *Hodgkinson v. Simms*, [1994] 3 SCR 377 at 443-44, La Forest J.

[91] *Canson Enterprises Ltd. v. Boughton & Company*, [1991] 3 SCR 534 at 543, McLachlin J.

[92] Alan Pratt, "Fiduciary Principles and the Compensation Guidelines of 'Outstanding Business,'" unpublished paper, Toronto, January 1992, p. 17.

> so far as the same goals are shared by tort and breach of fiduciary duty, remedies may coincide. But they may also differ.[93]

From the foregoing authorities, the Commission derives the principle that, regardless of whether the starting point is law or equity, it is necessary to look to the underlying policy behind compensating Long Plain for Canada's breach of treaty and determine what remedies will best further that policy. Although McLachlin and La Forest JJ in *Canson Enterprises* and *Hodgkinson* differed on whether the appropriate starting point should be law or equity, they agreed that, where the policy objectives require, equitable remedies may be used and moulded to meet the requirements of fairness in a given case.

According to La Forest J, in the case of a trust-based relationship, the trustee's obligation is to hold the *res* or object of the trust for his beneficiary. On breach, the concern of equity is that the *res* be restored to the beneficiary or, if that cannot be done, to afford compensation for what the object would be worth. Similarly, if in the case of a breach of fiduciary duty there is a specific property or proprietary interest that can be restored, restitutionary principles and remedies such as constructive trust can be applied to require the fiduciary to restore the property or interest to the beneficiary and to account for the profits wrongly obtained by the fiduciary. Where the fiduciary has received some benefit, that benefit can be disgorged.[94] We see no reason why the same equitable principles should not be applied in the case of a breach of treaty.

However, where there is no specific property that can be restored but there *has* been a breach of duty, the concern of equity is to ascertain the loss resulting from that breach. A court, exercising its equitable jurisdiction, can in lieu of restitution still award compensation to remedy that loss. What is lost as a result of the breach can include not only the value of an asset, but also the *lost opportunity* to use the asset profitably while the beneficiary has been deprived of it. In the Commission's view, there is nothing conceptually to distinguish "lost opportunity" as contemplated by Wilson and Dickson JJ in *Guerin* and by McLachlin J in *Canson Enterprises* from the sort of loss of use contemplated by the parties under Article 1.1(f) of the 1994 Settlement Agreement. We conclude, therefore, that equitable compensation for loss of use may be awarded as a matter of legal principle where the Crown owes an outstanding lawful obligation to an Indian band arising from a shortfall in the allocation of reserve land under treaty.

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[93] *Canson Enterprises Ltd. v. Boughton & Company*, [1991] 3 SCR 534 at 545, McLachlin J.

[94] Long Plain argues that Canada has benefited from its breach by failing to remove the shortfall lands from the operation of the *Dominion Lands Act*:

> By not so removing it, Canada was able to procure a benefit from it by patenting it and selling it or by transferring it to Manitoba under the NRTA [*Natural Resources Transfer Agreement*] and therefore the Crown in its duel [sic] aspect also procured the benefit of all forms of municipal, property, and income taxation. Bona fide purchasers for value without notice subsequently profited from land the Claimant says should have been reserved for them [sic] since 1876.

We do not view this submission as a request that these "profits" be disgorged; rather, in the context within which this statement was made, we consider that Long Plain was merely attempting to establish further evidence of Canada's breach of its fiduciary obligations to the First Nation. The real remedy being sought by Long Plain is compensation for the loss of use of the shortfall lands based on the highest and best use of those lands since 1876, and therefore we will not comment further on the disgorgement remedy unless it is raised in the second stage of this inquiry, if convened, to consider the quantum of compensation owing by Canada to the First Nation.

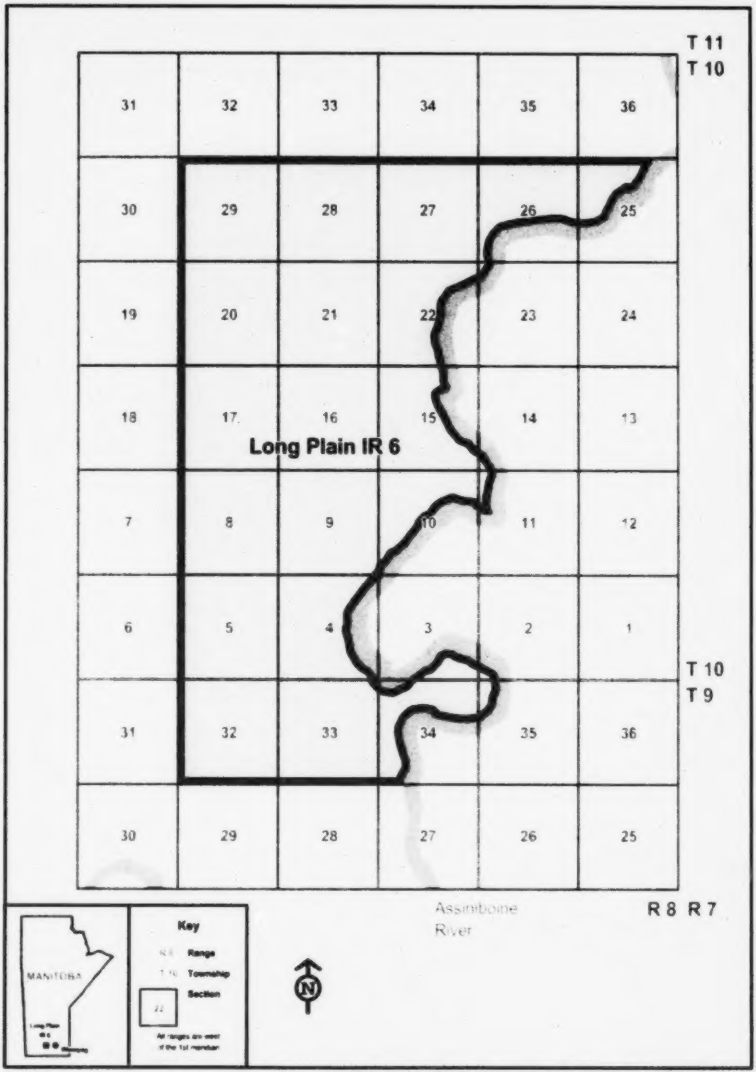
We turn now to the second basis on which Canada seeks to distinguish *Guerin*.

Need for a Specific Parcel of Land

As we have seen, one of the major thrusts of Canada's position in this inquiry is that loss of use is not payable where there is no specific parcel of land in relation to which the calculation of loss of use can be applied. According to counsel, the exercise of calculating such loss using a hypothetical parcel of land is so speculative that a court would refrain from doing so.

Long Plain's response to this position is that the shortfall lands are not just identifiable but can be specifically identified as sections within townships 9 and 10, range 8, west of prime meridian. Indeed, in its rebuttal submission, the First Nation contends that the most likely lands are sections 28 and 29 lying west of the Assiniboine River and adjoining the south boundary of the original reserve, as well as the adjacent section 27 on *both* sides of the river (see map 2 on page 333).

With all due respect to counsel for the First Nation, based on the evidence before us we cannot conclude that sections 27, 28, and 29 were more or less likely to have been selected as additional reserve lands than any of the other 11 sections of land that border the north and west boundaries of IR 6. Indeed, we feel quite confident in observing that the portion of section 27 lying across the Assiniboine River to the east was, if anything, decidedly *less* likely to have been included in the reserve than any of the land bounding the north, west, and south boundaries of the reserve. There is no evidence before us to suggest that any part of IR 6 has ever been situated on the east side of the Assiniboine River. Therefore, a suggestion that additional reserve lands would have been set apart there lacks credibility.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29
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Assiniboine River
R 8
R 7
MANITOBA
Key
R 8
Range
T 10
Township
22
Section
All ranges are west of the 1st meridian

Prepared by Public History Inc. Cartography by GIS Mapping

Map 2: Range and Township Map of Long Plain Indian Reserve 6

We think it more likely that the 1877 acres, whether configured as sections or quarter sections, would have been drawn from the 8640 acres within the roughly 13½ sections of land adjacent to the reserve's inland boundaries, and possibly within the additional 1280 acres lying within the two additional sections lying diagonally adjacent to the northwest and southwest corners of the reserve. Which of these lands would have been selected would have depended on the characteristics of the individual parcels and the needs and desires of the Band in 1876.

That being said, we believe that, by making reasonable assumptions regarding the nature of the additional reserve land that would have been selected, it should be possible to derive a fair and realistic estimate of the compensation to which the First Nation is entitled as a result of the loss of use of the shortfall lands. As Waddams states in *The Law of Damages*:

> The general burden of proof lies upon the plaintiff to establish the case and to prove the loss for which compensation is claimed. *In many cases the loss claimed by the plaintiff depends on uncertainties; these are of two kinds: first, imperfect knowledge of facts that could theoretically be known and secondly, the uncertainty of attempting to estimate the position the plaintiff would have occupied in hypothetical circumstances, that is to say, supposing that the wrong complained of had not been done.*
>
> American law has had considerable difficulty with this second type of uncertainty. The courts have used the requirement of certainty to inhibit or set aside what they consider to be excessive jury awards, with rigorous standards laid down in many cases. The consequence is that, where recovery is thought to be justified, the courts must strive to reconcile the results desired with prior restrictive holdings.
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> *In Anglo-Canadian law*, on the other hand, perhaps because of the decline in the use of the jury, *the courts have consistently held that if the plaintiff establishes that a loss has probably been suffered, the difficulty of determining the amount of it can never excuse the wrongdoer from paying damages. If the amount is difficult to estimate, the tribunal must simply do its best on the material available*, though of course if the plaintiff has not adduced evidence that might have been expected to be adduced if the claim were sound, the omission will tell against the plaintiff....
>
> The claimant must do as much by way of proof as can reasonably be expected in the circumstances but need not do more.[95]

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[95] S.M. Waddams, *The Law of Damages*, 2nd ed. (Aurora, ON: Canada Law Book Inc., 1991), ¶ 13.10-13.40.

The practical application of this approach by the trial judge in *Guerin* was described by McLachlin J in the following terms in *Canson Enterprises*:

> The trial judge in *Guerin* did not measure damages as the difference between the lease which was entered into and that which the Band was prepared to authorize, because the golf club would not have entered into a lease at all on the terms sought by the Band, and it could not therefore be said that the breach had caused the Band to lose the opportunity to enter a lease on the authorized terms. Nor did the trial judge simply assess damages as the difference between the value of the lease actually entered into and the amount that the land was worth at the time of trial, which would be the result if causation were irrelevant. Rather he concluded that had there been no breach the Band would have eventually leased the land for residential development. He allowed for the time which would have been required for planning, tenders and negotiation, and he also discounted for the fact that some of the then current value of the surrounding developments was due to the existence of the golf course. *In other words, he assessed, as best he could, the value of the actual opportunity lost as a result of the breach.*[96]

We have already noted the argument that *Guerin* should be distinguished from the present case because there is no doubt that the land in *Guerin* formed the subject matter of the lease to the golf club and was thus readily identifiable. However, we see no reason why, as a matter of law or policy, the principle of loss of use or lost economic opportunity, referred to in *Guerin* and elaborated upon by McLachlin J in *Canson Enterprises*, should be inapplicable where the subject land, although not precisely ascertainable, is at least confined to a limited general area that is readily capable of assessment.

In the cases we have reviewed, the significance of being able to identify specifically the assets forming the *res* or object of the equitable obligation is in *which* equitable remedies are available to the beneficiary, not *whether* remedies are available *at all*. Where there *is* a particular asset, remedies such as constructive trust, equitable lien, and tracing are available in proper circumstances to permit the asset to be restored *in specie* to the beneficiary. Where there is *no* such particular asset, such remedies are not available and equitable compensation is substituted to provide restitutionary relief to the extent that this can be accomplished by monetary means. The real question is what remedy – and, in the case of compensation, what quantum of compensation – is most appropriate to restore to the First Nation that which has been lost as a result of the breach, and whether any factors should operate to limit the extent of that remedy.

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[96] *Canson Enterprises Ltd. v. Boughton & Company*, [1991] 3 SCR 534 at 551-52, McLachlin J.

In fairness to Canada, we understand that the $16.5 million paid to Long Plain under the Settlement Agreement reflects considerably more than the current fair market value of the shortfall lands. This level of compensation, if attributed solely to the value of those 1877 acres, would yield a per acre value of roughly $8800, which would, we suspect, be a singularly unattractive and uneconomic price from the perspective of a purchaser of agricultural land in rural Manitoba. However, neither counsel before the Commission in this inquiry acted on his client's behalf during the negotiation of the Settlement Agreement, so neither was able to shed light on how the $16.5 million was allocated among market value of the shortfall lands and other heads of compensation. In any event, any compensation awarded for loss of use should, as a matter of law, be set off against that portion, if any, of the $16.5 million attributable to such loss. Indeed, the parties have also made this a matter of contract, as can be seen in the following provisions of Article 4 of the Settlement Agreement:

> **ARTICLE 4: SET OFF BY CANADA**
>
> 4.1 In the event the First Nation and Canada settle the First Nation's claim for Loss of Use, as a result of the process set out in Article 3 and, as a result, it is agreed that compensation is payable by Canada to the First Nation in respect of Loss of Use in an amount:
>
> (a) greater than at $16,500,000.00 Canada shall be entitled to set off against such quantum the sum of $13,500,000.00; or
>
> (b) less than or equal to $16,500,000.00, Canada shall be entitled to set off against such quantum the sum of $16,000,000.00, provided that in no case shall the First Nation be obliged to repay any amount of same to Canada.
>
> 4.2. In the event the claim of the First Nation is dealt with in any other way than in the manner described in Article 3 and in the result, an order is made in favor of the First Nation and against Canada:
>
> (a) where Canada has only paid to the First Nation the first instalment of the Federal Payment, Canada shall be entitled to set off the sum of $5,650,000.00 against the quantum of any amount it is ordered to pay to the First Nation; or
>
> (b) where Canada has paid to the First Nation both instalments of the Federal Payment, Canada shall be entitled to set off the sum of $13,500,000.00

> against the quantum of any amount it is ordered to pay to the First Nation.[97]

Given that the parties have already provided in the Settlement Agreement as to how set-off, if required, is to be calculated, nothing further need be said about that issue here.

Relevant Considerations in Determining Compensation

Long Plain argues, based on equitable principles, that causation, foreseeability, and remoteness are irrelevant in measuring the compensation available for loss of use. The implication of this argument is that compensation is to be based on the First Nation's lost opportunity to apply the land to its highest and best use, taking full advantage of the knowledge gained in hindsight to assess that compensation.[98] Therefore, because "agriculture represents [the] highest and best use [of the shortfall lands,] ... the proper valuation can only be achieved by reference to the land's value year by year as rental property or by detailed analysis of each agricultural year from 1876 onward to ascertain net profit from the highest yielding/selling crop in that year and so on year by year for the whole of the loss period."[99]

In response, Canada submits that loss of use does not represent an appropriate measure of compensation where the breach is "occasioned by an honest mistake based on mere inadvertence, with no suggestion of bad faith."[100] Since, according to counsel, "there is no evidence that Canada has acted other than honestly, 'a modern court' would not award damages that exceeded the return of the original principle [sic] amount."[101]

On this point, we find that we cannot agree fully with either party. The reasons of La Forest J in *Canson Enterprises* and *Hodgkinson v. Simms* amply demonstrate that, in the interests of equity and fairness, it is necessary for a court to have careful regard for the circumstances of the case to permit it to fashion a remedy, whether legal or equitable, that is tailored to fit those circumstances. In the specific context of a claim for loss of use, the Commission is prepared to conclude that compensation for loss of use is *available* in proper circumstances, but, in determining the quantum of such an award the Commission must examine all relevant variables arising from the facts, including matters such as the quantum of shortfall land at issue, the economic value of that land, the period during which the shortfall existed, and the conduct of both parties during that period. It is only by considering these variables that the Commission can decide whether, on the facts of the case, compensation for loss of use should be awarded and, if so, on what basis and in what amount. It follows that the compensation payable for loss of use may vary significantly from one case to another. The quantum of compensation to which a band is entitled must, in the final analysis, be proportionate to the actual loss suffered. In undertaking this process, we regard questions of causation, foreseeability, remoteness, and mitigation as being very much in issue.

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[97] Settlement Agreement, August 3, 1994 (ICC Documents, pp. 540-41).
[98] Submissions on Behalf of the Long Plain First Nation, August 27, 1997, p. 61.
[99] Submissions on Behalf of the Long Plain First Nation, August 27, 1997, p. 63.
[100] Submissions on Behalf of the Government of Canada, September 26, 1997, p. 16.
[101] Submissions on Behalf of the Government of Canada, September 26, 1997, p. 17.

The consideration or weighing of these variables goes primarily to the issue of the *quantum* of compensation, and, in the context of the present proceedings, should be reserved, in our view, for the second stage of this inquiry. In the first instance, we recommend that the parties attempt to negotiate a settlement of the compensation to which the First Nation is entitled arising from the loss of use of the shortfall lands. If they are unable to reach a satisfactory settlement, it is, of course, open to them to return to the Commission to address the issue of quantum.

PART V

CONCLUSIONS AND RECOMMENDATION

We have been asked to inquire into and report on whether the Government of Canada owes an outstanding lawful obligation to the Long Plain First Nation with regard to the shortfall in reserve land allocated to the First Nation. More specifically, we have been asked to decide whether a band with an admitted shortfall in its treaty land entitlement is entitled to be compensated for its loss of use under the Specific Claims Policy. In this case, Long Plain did not receive funds in compensation for the outstanding shortfall lands until 118 years after the reserve was set aside, and the resultant claim for loss of use seeks compensation for the fact that the First Nation lost the use of those lands for that 118-year period.

On the question of liability, we conclude that, under the terms of the Specific Claims Policy, a band with an admitted shortfall in its treaty land entitlement is entitled to claim compensation for its loss of use of that shortfall acreage. In the Commission's view, loss of use is compensable as part of Canada's outstanding lawful obligation arising from a treaty land entitlement shortfall. There are three possible – and possibly concurrent – foundations for Canada's liability in this respect, two of which are evident in the present claim.

First, it may be said that Canada's failure to deliver a band's entire land entitlement is, in effect, a breach of the terms of the treaty itself. We have concluded in this case that Canada breached the terms of Treaty 1 and that this breach gives rise to an enforceable cause of action for loss of use compensation.

Second, we also believe that such a failure is a violation of the trust-like responsibilities that Canada owes First Nations in respect of matters concerning Indian title, and is therefore a breach of fiduciary duty. This is an alternative basis of liability only. Our finding of liability in this case is based on breach of treaty.

Finally, quite apart from this trust-like responsibility or general fiduciary obligation, Canada's conduct may, in certain cases, substantiate a separate cause of action based upon breach of fiduciary duty. We have declined to make such a finding in this case.

We have also provided very clear direction to Long Plain and Canada with respect to what we believe to be the proper approach to the quantification of such a loss of use claim. We have concluded that a claim of this nature, whether characterized as a breach of treaty or a breach of fiduciary duty, gives rise to an equitable jurisdiction in the determination of compensation. Therefore, all the factors that would be relevant in such a case in a court of equity must be considered to arrive at a result that is just, equitable, and proportionate to the wrong suffered. In particular, a court may have full regard for the conduct of both Canada and the band within the appropriate historical context, but also to common law principles of foreseeability, remoteness, causation, and mitigation. Canada's state of knowledge relative to the existence of the claim is one relevant consideration. So, too, is any explanation that Canada may offer for its failure to respond to the claim at an earlier date. Obviously, the amount of land at issue, the economic value of that land, and the period of time during which the obligation remained outstanding are also very relevant. In our view, all of these matters relate to the *quantification* of the First Nation's entitlement to compensation once it has been established that Canada is in breach of the terms of the treaty. Further characterizing Canada's conduct as a breach of fiduciary duty neither adds to, nor subtracts from, the remedies available in assessing compensation.

In conclusion, it is our recommendation that Canada accept and negotiate Long Plain's claim to be compensated for loss of use of the shortfall acreage. The Commission is certainly prepared to assist the parties in the determination of compensation, if requested.

We therefore recommend to the parties:

That the claim of the Long Plain First Nation regarding the loss of use of its treaty land entitlement shortfall be accepted for negotiation under the Specific Claims Policy.

FOR THE INDIAN CLAIMS COMMISSION

P.E. James Prentice, QC Commission Co-Chair	Daniel J. Bellegarde Commission Co-Chair	Carole T. Corcoran Commissioner

Dated this 1st day of March, 2000.

APPENDIX A

LONG PLAIN FIRST NATION LOSS OF USE INQUIRY

1	**Planning conferences**	Edwin, Manitoba, August 29, 1995 Ottawa, December 9, 1996 Ottawa, February 14, 1997

2 **Community sessions**

By agreement of counsel for the parties, community sessions were considered unnecessary for dealing with the legal issue before the Commission at the inquiry.

3	**Legal argument**	Winnipeg, October 17, 1997

4 **Content of formal record**

The formal record for the Long Plain First Nation Loss of Use Inquiry consists of the following materials:

- the documentary record (4 volumes of documents)
- 8 exhibits tendered during the inquiry
- transcript of oral submissions (1 volume)
- written submissions of counsel for Canada and written submissions and rebuttal submissions of counsel for the Long Plain First Nation, including authorities submitted by counsel with their written submissions

The report of the Commission and letters of transmittal to the parties will complete the formal record of this inquiry.

INDIAN CLAIMS COMMISSION

BIGSTONE CREE NATION INQUIRY
TREATY LAND ENTITLEMENT CLAIM

PANEL

Commission Co-Chair Daniel J. Bellegarde
Commission Co-Chair P.E. James Prentice, QC
Commissioner Carole T. Corcoran

COUNSEL

For the Bigstone Cree Nation
William S. Grodinsky

For the Government of Canada
Perry Robinson

To the Indian Claims Commission
David E. Osborn, QC / Kathleen Lickers

MARCH 2000

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PART I

INTRODUCTION

The process that led to the Commission's inquiry into the treaty land entitlement claim of the Bigstone Cree Nation began in July 1989, when a Statement of Claim on behalf of the First Nation was filed with the Department of Indian Affairs and Northern Development (DIAND) under the federal Specific Claims Policy. In its submission the First Nation contended, *inter alia*,

> whereas ... the Government of Canada neglected or failed to act to satisfy the entitlement of the Bigstone Band, there remains outstanding to the Bigstone Band a land entitlement pursuant to the terms of Treaty Eight.[1]

Accordingly, the submission claimed an entitlement to reserve land under Treaty 8 based on the then current population of the Bigstone Cree Nation.[2] A somewhat more detailed Statement of Claim filed in 1991 claimed the same relief.[3]

As early as 1990, the First Nation and Canada invited Alberta to join them in tripartite discussions regarding the claim, and representatives of these three parties held a series of meetings over the next few years. These discussions culminated in the signing of a Memorandum of Intent by negotiators representing the Bigstone Cree Nation, Canada, and Alberta on September 15, 1993. This agreement set out procedures for negotiating the size of the Bigstone treaty land entitlement claim, the land selection, compensation, and other matters that normally arise in treaty land entitlement negotiations; it also set out a schedule that aimed at reaching an agreement in principle for the settlement of the claim by March 31, 1995.[4]

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[1] "Statement of Claim for an Unfulfilled Treaty Land Entitlement Claim under Treaty Eight," prepared on behalf of the Bigstone Band by Treaty and Aboriginal Rights Research, July 1989 (ICC Exhibit 3, pt IV).

[2] "Statement of Claim for an Unfulfilled Treaty Land Entitlement Claim under Treaty Eight," prepared on behalf of the Bigstone Band by Treaty and Aboriginal Rights Research, July 1989 (ICC Exhibit 3, pt V).

[3] "Bigstone Band Specific Land Claim: Treaty Eight Land Entitlement and Related Obligations," prepared on behalf of the Bigstone Band by William Gordinsky, 1991 (ICC Exhibit 5, pt V).

[4] Memorandum of Intent by Bigstone Cree Nation, Canada, and Alberta, September 15, 1993 (ICC Exhibit 29).

In early 1994, DIAND officials advised the Bigstone Cree Nation and Alberta that the Department of Justice was expressing doubts as to whether, under the interpretation of guidelines then being used to determine a First Nation's land entitlement under treaty,[5] the Bigstone Cree Nation had a valid treaty land entitlement claim. Representatives of the First Nation and DIAND worked together over the months that followed to prepare a joint submission to the Department of Justice, a process which was completed by June 1994.[6]

In January 1995, officials from DIAND and the Department of Justice advised the Bigstone Cree Nation that, in the government's view, the First Nation had not established the basis for a validation of its treaty land entitlement claim, and the First Nation was invited to provide additional evidence to prove the existence of such a claim. During 1995, the First Nation submitted additional genealogical evidence[7] and legal arguments,[8] but on March 15, 1996, A.J. Gross, Director of Treaty Land Entitlement for DIAND, advised then Bigstone Chief Gordon Auger that

> Canada's position with regard to this TLE claim is that the First Nation has not established, under the Specific Claims Policy, an outstanding lawful obligation owed by Canada. Accordingly, we are unable to accept the claim for negotiation.[9]

On April 9, 1996, W.S. Grodinsky,[10] counsel for the Bigstone Cree Nation, wrote the Indian Claims Commission requesting an inquiry into the rejection of the First Nation's claim by the federal government.[11] On April 18, 1996, the Commission agreed to conduct an inquiry, and a planning conference was held on July 25, 1996.

In the course of its inquiry, the Commission received as exhibits the substantial collection of genealogical and historical evidence compiled on behalf of the Bigstone Cree Nation, Canada, and Alberta between 1989 and 1995. The Commission also requested that an additional historical and genealogical report be undertaken, and more than a dozen additional exhibits were collected from other sources. In its entirety, the documentation collected by the Commission extends to several linear metres.

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[5] This issue was encountered by the Commission in the inquiry into the treaty land entitlement claim of the Fort McKay First Nation. See Indian Claims Commission, *Inquiry into the Treaty Land Entitlement Claim of the Fort McKay First Nation* (Ottawa, December 1995), reported (1996) 5 ICCP 3 at 14.

[6] Joint Bigstone Cree Nation and DIAND brief for Department of Justice and related correspondence, April 22 to June 6, 1994 (ICC Exhibit 19).

[7] Research prepared by Walter Zuk and Louise Zuk for the Band's submission to the Office of Native Claims, March 16, 1995 (ICC Exhibit 21).

[8] "Supplementary Brief Submitted to the Department of Justice with Respect to Various Matters Relating to the Treaty Land Entitlement Claim of the Bigstone Cree Band," December 14, 1995 (ICC Exhibit 30).

[9] A.J. Gross, Director, Treaty Land Entitlement, DIAND, to Chief Gordon Auger, Bigstone Cree Nation Indian Band, March 15, 1996 (ICC Exhibit 26).

[10] Like many others, the Commissioners and staff of the Indian Claims Commission mourn the sudden and unexpected death of Bill Grodinsky in 1998. Mr Grodinsky was not only a great friend to and advocate for First Nations but a man of tremendous dignity and courtesy.

[11] William S. Grodinsky, Byers Casgrain, to Ron Maurice, Commission Counsel, Indian Claims Commission, April 9, 1996 (ICC Exhibit 31).

At the heart of the Commission's information-gathering process is the mandate to gather evidence from the elders of a First Nation. In the course of the Bigstone inquiry, the Commission held three community sessions. The first, held in Desmarais on October 29, and Trout Lake on October 30, 1996, heard from elders from the existing Bigstone reserves (Wabasca IR 166, see map on page 354). A second, also held at Desmarais on July 3, 1997, heard the evidence of elders from Calling and Chipewyan Lakes. The final community session, held in Peerless Lake on December 9, 1997, heard from elders from Peerless and Trout Lakes.

Final legal arguments by counsel for the Bigstone Cree Nation and Canada were scheduled for the spring of 1998, but were postponed when DIAND advised that the 1996 rejection of the Bigstone claim was being reviewed in light of a change in federal policy regarding the validation of treaty land entitlement claims announced on April 30, 1998.[12] This change in policy was, in part, a response to the recommendations made by the Commission in its report relating to the treaty land entitlement claim of the Fort McKay First Nation.[13] On October 13, 1998, Jane Stewart, the then Minister of Indian Affairs and Northern Development, wrote Bigstone Cree Nation Chief Melvin Beaver to advise that the federal government had accepted the Bigstone treaty land entitlement claim for negotiation.[14] Accordingly, the Commission has suspended its inquiry and will continue to monitor the progress of negotiations regarding the claim. A complete summary of the documentary evidence, transcripts, and the balance of the record in this inquiry is set forth in Appendix B of this report.

ISSUES

The basic facts of the Bigstone Cree Nation case are not in dispute. Canada conceded that, when reserves were first surveyed for the Bigstone Cree

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[12] DIAND, Press Release, April 30, 1998 (reproduced as Appendix A).

[13] Indian Claims Commission, *Inquiry into the Treaty Land Entitlement Claim of the Fort McKay First Nation* (Ottawa, December 1995), reported (1996) 5 ICCP 3.

[14] Jane Stewart, Minister of Indian Affairs and Northern Development, to Chief Melvin Beaver, Bigstone Cree Nation, October 13, 1998.

Nation in 1913, insufficient land was provided to satisfy the First Nation's land entitlement under Treaty 8. The parties also agreed that a substantial number of late adherents entered the Bigstone Cree Nation subsequent to this survey and that additional reserve land was set apart for the Bigstone Cree Nation in 1937.

However, the parties differed on the implication of the date-of-first-survey shortfall in 1913, the post-survey adherents to the Bigstone Cree Nation, and the provision of additional reserve land in 1937. The First Nation claimed in its 1989 and 1991 submissions under the Specific Claims Policy that, since it had not been provided with sufficient reserve land for its 1913 population in 1913 or its 1937 population in 1937, it was entitled to a reserve based on its current population. Alternatively, the First Nation asserted that, based on the principles enunciated in the Commission's report on the Fort McKay treaty land entitlement claim, a shortfall existed as a result of Canada's failure to provide sufficient reserve land in 1913 and the large number of post-survey adherents who joined the Bigstone First Nation. Canada took the position that the treaty land entitlement population of the Bigstone Cree Nation crystallized with the first survey of reserves in 1913. Therefore, since the 1913 and 1937 surveys combined to satisfy the treaty land entitlement of the 1913 population of the Bigstone Cree Nation, the obligation to provide reserve land had been satisfied and no additional land was owed to the First Nation for post-survey adherents to the First Nation's population.

The second survey in 1937 introduced an element that the Commission had not been forced to consider in the Fort McKay inquiry. However, the policy change announced in April 1998 and Canada's acceptance of the Bigstone claim for negotiation in October represented an abandonment, at least for the purpose of negotiation, of the position taken by Canada before the Commission and, as a result, the Commission was not compelled to consider the issue.

MANDATE OF THE INDIAN CLAIMS COMMISSION

The Commission was established in 1991 to assist First Nations and Canada in the negotiation and fair resolution of specific claims. Order in Council PC 1992-1730 empowers the Commission to inquire into and report on whether or not Canada has properly rejected a specific claim:

> AND WE DO HEREBY advise our Commissioners on the basis of Canada's Specific Claims Policy published in 1982 and subsequent formal amendments or additions as

> announced by the Minister of Indian Affairs and Northern Development (hereinafter "the Minister"), by considering only those matters at issue when the dispute was initially submitted to the Commission, inquire into and report on:
>
> a) whether a claimant has a valid claim for negotiation under the Policy where that claim has already been rejected by the Minister[.][15]

If the Commission had completed the inquiry into the Bigstone Cree Nation treaty land entitlement claim, the Commissioners would have evaluated that claim based on Canada's Specific Claims Policy. DIAND has explained that policy in a booklet entitled ***Outstanding Business: A Native Claims Policy – Specific Claims***.[16] In particular, the government says that, when considering specific claims:

> it will recognize claims by Indian bands which disclose an outstanding "lawful obligation," i.e., an obligation derived from the law on the part of the federal government.
>
> A lawful obligation may arise in any of the following circumstances:
>
> i) The non-fulfillment of a treaty or agreement between Indians and the Crown.

The Commission has the authority to review thoroughly the historical and legal bases for the claim and the reasons for its rejection with the claimant and the government. The ***Inquiries Act*** gives the Commission wide powers to conduct such an inquiry, to gather information, and even to subpoena evidence if necessary. If, at the end of an inquiry, the Commission concludes that the facts and law support a finding that Canada owes an outstanding lawful obligation to the claimant First Nation, it may recommend to the Minister of Indian Affairs and Northern Development that the claim be accepted for negotiation.

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[15] Commission issued September 1, 1992, pursuant to Order in Council PC 1992-1730, July 27, 1992, amending the Commission issued to Chief Commissioner Harry S. LaForme on August 21, 1991, pursuant to Order in Council PC 1991-1329, July 15, 1991.

[16] DIAND, ***Outstanding Business: A Native Claims Policy – Specific Claims*** (Ottawa: Minister of Supply and Services, 1982) [hereafter ***Outstanding Business***].

PART II

HISTORICAL BACKGROUND

BIGSTONE CREE NATION IN THE 19TH CENTURY

The concentration of the six existing Bigstone Reserves in the vicinity of North and South Wabasca, Sandy, and Calling Lakes may suggest that the population of the Bigstone Cree Nation is, and has historically been, concentrated solely in these locations. In fact, evidence provided by Bigstone elders, both in community sessions and in previous forums, details longstanding occupation, on at least a seasonal basis, of dozens of lakes and other locations over a massive area of northern Alberta.

Elders spoke not only of traditions they had learned, but also of their personal experiences. Of the six members of the elders' panel who met with the Commission in Desmarais on October 29, 1996, one had been born at Chipewyan Lake, one at Mink Lake, north of Chipewyan Lake, and one at Wadlin Lake,[17] some 250 kilometres north of Wabasca and only 80 kilometres south of Fort Vermilion. Although the events of the past few generations, including the decline in the traditional fur trade economy[18] and the construction of schools at central locations, have resulted in a concentration of the Bigstone Cree Nation, the wide diffusion of its population throughout most of the 19th and 20th centuries has influenced every aspect of the First Nation's past and present.

This diffusion suggests a 19th-century social organization of the people who came to be recognized as the Bigstone Cree Nation that was loose and atomistic. The Commission first encountered such a situation in the inquiry into the treaty land entitlement of the Fort McKay First Nation. In that case, the Commission accepted as accurate the description of traditional Woodland Cree society set out by the late Dr James G.E. Smith, the former curator of

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[17] ICC Transcript, October 29, 1996, pp. 13 (Alphonse Auger), 30 (Daniel Beaver), and 44 (Tommy Auger).

[18] G. Neil Reddekopp, "The Treaty Land Entitlement Claim of the Bigstone Cree Nation," report prepared for the Indian Claims Commission, January 1997 (ICC Exhibit 33, p. 17) [hereafter Reddekopp Report].

North American ethnology for the Museum of the American Indian in New York. Dr Smith's conclusions were as follows:

> [T]he fundamental unit of social organization was the local or hunting band, which consisted of several (two to five) related families which normally comprised ten to thirty individuals. These groups existed separate and apart from other entities as hunting groups through the fall, winter and spring of each year. For a period in the summer of each year, several hunting bands would congregate on the shores of lakes that would allow subsistence through fishing and local hunting. The regional bands which resulted from this congregation, which could number from one hundred persons to a group two to three times that size, represented the largest co-operative unit in the area. Membership among both hunting or regional bands was flexible, with individuals and families being free to leave one group and join another, either temporarily or permanently.[19]

Bigstone elders gave compelling evidence describing this pattern of seasonal migration. According to Trout Lake elder George Noskiye,

> there were not that many people in Trout Lake at the time [as late as the 1930s]because of the fact, you know, you have to survive, you can't maintain in one area. Because people, wherever people see where they can make, you know, feed your family, that's where they will go and stay there, and move on and move on.[20]

Elders who met with the Commission acknowledged that the limited contact among the various "hunting bands" complicated their efforts to assist the Commissioners in understanding the details of 19th- and early 20th-century history in the Bigstone communities. Witnesses spoke of what were likely similar, rather than common, histories of their ancestors. In the words of Peerless Lake elder Felix Noskiye,

> you have to remember, everyone had a little territorial area, like from anywhere wherever the – each individual family picked a spot for the best; they call their little territory. So people were far scattered.
>
> The only thing that you hear is from your family. It's not a matter of gathering like it is today. So people were too scattered everywhere.[21]

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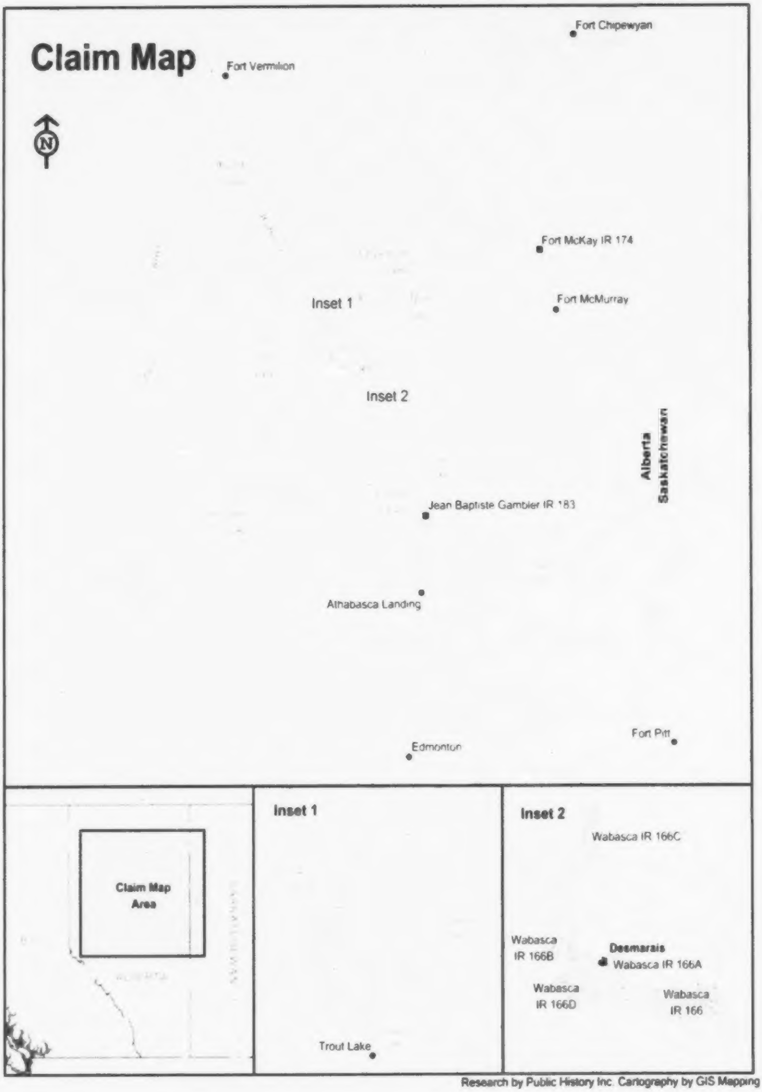
[19] This issue was also encountered by the Commission in the inquiry into the treaty land entitlement claim of the Fort McKay First Nation; see (1996) 5 ICCP 3 at 21.

[20] ICC Transcript, July 3, 1997, p. 199 (George Noskiye).

[21] ICC Transcript, July 3, 1997, pp. 154-55 (Felix Noskiye).


Claim Map
Fort Chipewyan
Fort Vermilion
N
Fort McKay IR 174
Inset 1
Fort McMurray
Inset 2
Alberta
Saskatchewan
Jean Baptiste Gambler IR 183
Athabasca Landing
Fort Pitt
Edmonton
Claim Map Area
Inset 1
Trout Lake
Inset 2
Wabasca IR 166C
Wabasca IR 166B
Desmarais
Wabasca IR 166A
Wabasca IR 166D
Wabasca IR 166

Research by Public History Inc. Cartography by GIS Mapping

Almost three decades before the Commission met with Bigstone elders, an earlier generation of elders told their stories in a series of other forums. The late Martin Beaver, the father and grandfather of current Bigstone elders, recalled the late 19th century as a time when "[p]eople used to travel around, they moved even in the winter time."[22]

Only a handful of those lakes identified above as at least seasonal residences were suitable to act as meeting places for the entities described by Professor Smith as "regional bands." Bigstone elder Alphonse Auger remembers the north end of North Wabasca Lake (contained within the current Indian Reserve [IR] 166C) as one such location,[23] while other sources have identified Sandy Lake, Trout Lake, and Chipewyan Lake as meeting places for "regional bands."[24]

Representatives of European society set down their first permanent roots in the Bigstone communities only about a generation prior to the signing of Treaty 8, 75 to 100 years after their appearance at Fort Chipewyan, Fort Vermilion, Fort McMurray, and Lesser Slave Lake. The precise date at which the Hudson's Bay Company (HBC) established a post between North and South Wabasca Lakes is unknown, but it was probably built shortly after HBC Inspector Richard Hardisty recommended it in 1880, describing Wabasca as "a spot where a great many Indians resort during the winter for fishing and hunting."[25] Bigstone elders remember that the first HBC post at Wabasca was managed by Charles Houle, a Métis who moved to Wabasca from Lac La Biche.[26] The establishment at Wabasca did not become an independent post until 1900, after being an outpost of Lac La Biche (until 1888) and Athabasca Landing.[27]

HBC outposts at Trout Lake and Chipewyan Lake likely predate the Wabasca outpost. An 1889 HBC inspection report described one of the post's four buildings as a "very old" sales shop, and indicated that the outpost had been in existence for at least 16 years.[28] Although precise information concerning the establishment of the HBC outpost at Chipewyan Lake is lacking, it likely took place about the same time as the Trout Lake outpost was built.[29] Bigstone elders from Chipewyan Lake[30] and Trout Lake[31] credit the establishment of the outposts at these locations to two brothers, Jean Baptiste and Alexis Auger, respectively. Descendants of Jean Baptiste and Alexis were well represented among the elders who met with the Commission during its inquiry.

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[22] *"The Wabasca Tapes." Transcripts of 1968 Interviews with Seven Elders of the Bush Cree Nation, by Ray Yellowknee* (ICC Exhibit 1, p. 61, interview with Martin Beaver). Martin Beaver was the father of Daniel Beaver and the grandfather of Alphonse Auger (ICC Transcript, October 29, 1996, pp. 30 and 16).

[23] ICC Transcript, October 29, 1996, p. 14 (Alphonse Auger).

[24] Richard Daniels, "Land Rights of the Isolated Communities of Northern Alberta," report prepared for the Isolated Communities Advisory Board and the Lubicon Lake Band, January 1975 (ICC Exhibit 43, pp. 2, 4, 5).

[25] Richard Hardisty, Inspector, to James A. Grahame, Chief Commissioner, June 20, 1880, Provincial Archives of Manitoba, Hudson's Bay Company Archives (hereafter HBCA), D20/16, quoted in Reddekopp Report, January 1997 (ICC Exhibit 33, p. 5).

[26] Patricia Sawchuk and Jarvis Gray, *The Isolated Communities of Northern Alberta* (Edmonton: Metis Association of Alberta, 1980), interview with Harry Houle, grandson of Charles Houle (ICC Exhibit 25, p. 343).

[27] Richard Hardisty, Inspector, to James A. Grahame, Chief Commissioner, June 20, 1880, HBCA, D20/16, quoted in Reddekopp Report, January 1997 (ICC Exhibit 33, p. 5).

An Oblate missionary may have made a brief visit to Trout Lake as early as 1878,[32] but the first documented missionary visit was in February 1891, when an Oblate missionary stayed for several days and conducted 31 baptisms and six marriages.[33] The next month, the missionary moved on to Wabasca, where he baptised 38 persons and officiated at six marriages.[34] A Church of England missionary visited Wabasca about the same time, but details of his pastoral success are unknown.[35]

The 1891 missionary visit to Trout Lake extended only to the HBC post located at the south end of Graham Lake (identified by Bigstone elders as "Old Post"),[36] but when Bishop Emile Grouard followed in 1896, he was able to make a brief visit to the north end of Peerless Lake. His activity there was limited to five baptisms,[37] which Bishop Grouard attributed to the continuing influence of an individual he described as "*un sorcier fameux*."[38] A Church of England missionary reached Peerless Lake in 1897,[39] the same year an Oblate missionary visited Chipewyan Lake.[40]

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[28] Inspection Reports on Posts in the Athabasca, Peace River, and Mackenzie River Districts, taken from notes made by the late Richard Hardisty, 1889, HBCA, D25/9, p. 45, cited in Reddekopp Report, January 1997 (ICC Exhibit 33, p. 5).

[29] Referred to in Reddekopp Report, January 1997 (ICC Exhibit 33, p. 6).

[30] Diane Mieli, *Those Who Know: Profiles of Alberta Native Elders* (Edmonton: NeWest, 1991), 208, referred to in Reddekopp Report, January 1997 (ICC Exhibit 33, p. 7).

[31] Peerless Lake Presentation to Indian Affairs, "And We Need Land: A Statement of Grievances by the Cree People of Peerless Lake, Alberta," December 1985 interview with Julian Gladue (ICC Exhibit 2, p. 49)

[32] A. Philippot, omi, "Annales de la Mission Saint-Martin du Wabaska, 1891–1941," unpublished manuscript, nd, p. iv (ICC Exhibit 20B, doc. 323 [translation]).

[33] Of the 31 baptisms, 29 involved the extended family of HBC trader Alexis Auger, including Alexis himself, his four children and their spouses, 19 grandchildren, and one great-grandchild. The six marriages involved Alexis, his four children, and one grandchild. G. Neil Reddekopp, Senior Manager Policy, Indian Land Claims, Alberta Aboriginal Affairs, to Bruce Hirsche, Bishop and McKenzie, Barristers and Solicitors, September 6, 1994. Referred to in Collection of Documents on Peerless Lake, History and Entitlement (ICC Exhibit 32)

[34] Historical Documents from 1850–1989 (ICC Exhibit 20B, doc. 323, p. 1).

[35] Historical Documents from 1850 –1989 (ICC Exhibit 20B, doc. 323, pp. 12-13).

[36] ICC Transcript, October 29, 1996, pp. 64-65 (Tommy Auger).

[37] One of the children baptised by Bishop Grouard was Thomas (Toma) Noskiye. Over a hundred years later, the Commission heard from George Noskiye, the 92-year-old son of Thomas Noskiye. ICC Transcript, July 3, 1997, pp. 189, 193 (George Noskiye).

[38] E. Grouard, omi, "Un Journal de voyage de Mgr. E. Grouard, Missions de la Congregation des Oblats de Marie Imaculée, December 1896," p. 425, Provincial Archives of Alberta (hereafter PAA), accession 71.220, in Historical Documents from 1850–1989 (ICC Exhibit 20B, doc. 268).

The relatively late and intermittent contact between missionaries and the population of the Bigstone communities rendered accurate estimates of the region's late-19th-century population difficult. In the early 1890s, Oblate missionaries advised the Indian Commissioner that the population of Wabasca was 248, of which 154 were Catholic, 20 were Protestant, and 74 were "pagan."[41] Not surprisingly in light of the intense competition between the Catholic and Protestant missionaries,[42] the Church of England missionary did not dispute the estimate of total population, but suggested that the proportion between the membership of the two churches was approximately the reverse of that given by his rival.[43] The Church of England missionary made no reference to a population at Trout Lake in the early 1890s, but Catholic missionaries estimated that 74 persons lived at Trout Lake and God's Lake, and that these persons were divided almost equally into Catholics and "pagans."[44]

Several months before the Treaty 8 and Athabasca Scrip Commissions began their work in the summer of 1899, the North-West Mounted Police undertook a census of the sites the Commissioners hoped to visit. They were prevented by high water from visiting Wabasca, but they were able to reach Trout Lake,[45] where they encountered a population of 86.[46]

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[39] Reverend Charles R. Weaver to Bishop Richard Young, December 4, 1897, PAA, accession 70.387, Historical Documents from 1850–1989 (ICC Exhibit 20B, doc. 252).

[40] Historical Documents from 1850–1989 (ICC Exhibit 20B, doc. 323, p. 18).

[41] A. Forget, Commissioner of Indian Affairs, North-West Territories, to Right Reverend Richard Young, Bishop of Athabasca, June 21, 1894, PAA, accession 70.387, Historical Documents from 1850–1989 (ICC Exhibit 20B, doc. 12).

[42] The late Bigstone elder Martin Beaver, who spent different times in his life as a member of both the Roman Catholic and the Church of England congregations at Wabasca, recalled in 1968 the bitter rivalry between the missionaries, including one missionary's description of another as "the devil's disciple." *"The Wabasca Tapes," Transcripts of 1968 Interviews with Seven Elders of the Bush Cree Nation, by Ray Yellowknee*, interview with Martin Beaver (ICC Exhibit 1, pp. 75-76).

[43] Statistics for Wabasca, November 25, 1894, PAA, accession 70.387, referred to in Reddekopp Report, January 1997 (ICC Exhibit 33, pp. 6-7).

[44] Historical Documents from 1850–1989 (ICC Exhibit 20B, doc. 12).

[45] The name "Trout Lake" has meant different things at different times. In modern parlance, it refers to the community at the south end of Graham Lake, occupied largely but not exclusively by members of the Bigstone Cree Nation. Historically, it may refer to the HBC post located on the site of the modern community or be the collective name for the two lakes now known as Peerless Lake and Graham Lake, with the stream connecting the two lakes being described as "Trout Lake Narrows." Letter of September 6, 1994, referred to in a Collection of Documents on Peerless Lake, History and Entitlement (ICC Exhibit 32).

[46] North-West Mounted Police, Census of Indians and Half-breeds in Peace River District, April 5, 1899, National Archives of Canada (hereafter NA), RG 18, vol. 1435, file 76, pt 2, Historical Documents from 1850–1989 (ICC Exhibit 20B, doc. 27).

THE TREATY AND SCRIP COMMISSIONS OF 1899

Wabasca was the final scheduled stop for the Treaty and Scrip Commissions in 1899, with Treaty Commissioner J.H. Ross meeting the assembled population there on August 14, 1899.[47] After a brief discussion, an adhesion to Treaty 8 was executed by Chief Joseph Bigstone (Kapusekonew) and Headmen Joseph and Michel Auger (written Ansey in the treaty document), Wapoose, and Louison (Louisa in the treaty document) Beaver.[48]

Bigstone elders were able to provide few details of the signing of the adhesion, although Alphonse Auger did indicate that the opportunity to gain permanent "ownership" of a reserve was the factor which led his grandfather Martin Beaver to enter treaty.[49] In the late 1960s, Martin Beaver himself was interviewed regarding his recollection of the meeting with Commissioner Ross. According to Martin, who was a young adult in 1899,[50]

> he [the treaty Indian] could hunt whenever he wanted, there were no limitations in that sense, he was pretty well free to do what he needed to do to survive ...
> And eventually he would get houses ...
> ...
> the people that chose to become Treaty they were given $10.00 initially and $5.00 for the handshake to seal the deal. Every year for as long as the sun shines and the river flows this is going to happen – every person would receive $5.00.[51]

With specific reference to the promise of reserve land, Martin Beaver remembered the Treaty Commissioner as indicating "there were reserve boundaries that would be developed in the future."[52]

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[47] Because of rainy weather and high water, the Treaty and Scrip Commissioners were two weeks behind schedule by the time they reached Lesser Slave Lake, their first stop; they therefore had to split up and travel in two groups to make up time. Originally, Chief Commissioner David Laird travelled alone, and the two other Commissioners, James Ross and J.A.J. McKenna, remained together. Later, Ross and McKenna were forced to travel separately in order to visit both Wabasca and Fort McMurray. "Report of the Commissioners for Treaty 8," *Treaty No. 8, Made June 21, 1899 and Adhesions, Reports, Etc.*, DIAND Publication QS-0576-EE-A-16 (1899; repr. Ottawa: Queen's Printer, 1966). Treaty 8 is reprinted in (1995) 3 ICCP 87.

[48] *Treaty No. 8, Made June 21, 1899 and Adhesions, Reports, Etc.*, DIAND Publication QS-0576-EE-A-16 (1899; reprinted Ottawa: Queen's Printer, 1966). Treaty 8 is reprinted in (1995) 3 ICCP 87.

[49] ICC Transcript, October 29, 1996, p. 16 (Alphonse Auger).

[50] Documentary evidence obtained by the Commission, from various sources, indicates that Martin was born about 1878 and therefore was 21 in 1899. Referred to in Reddekopp Report, January 1997, table 1, number 82 (ICC Exhibit 33). At the time Martin was interviewed in 1968, it was suggested that he was in his early 30s in 1899. *"The Wabasca Tapes," Transcripts of 1968 Interviews with Seven Elders of the Bush Cree Nation, by Ray Yellowknee*, interview with Martin Beaver (ICC Exhibit 1, p. 60).

[51] *"The Wabasca Tapes," Transcripts of 1968 Interviews with Seven Elders of the Bush Cree Nation, by Ray Yellowknee*, interview with Martin Beaver (ICC Exhibit 1, p. 61).

[52] *"The Wabasca Tapes," Transcripts of 1968 Interviews with Seven Elders of the Bush Cree Nation, by Ray Yellowknee*, interview with Martin Beaver (ICC Exhibit 1, p. 61).

Current and past elders also related stories regarding the choice to enter treaty or accept scrip in 1899. Most suggest that the effect of the decision between scrip and treaty was explained to, and understood by, those who were present in 1899. The late Catherine Auger, who received scrip at Wabasca in 1899 with her first husband, remembered almost 70 years later that she and the other scrip recipients "were told that the land you were given, you could sell, but you wouldn't have any rights."[53] According to the late Martin Beaver, the Treaty Commissioner required those who wished to apply for scrip to listen to the Commissioner's presentation in favour of entering treaty, so that, once the choice was made, "you cannot blame anybody else but yourself."[54]

Elder Alphonse Auger advised the Commission that one of those who chose scrip over treaty was Julien Beaver (identified by Alphonse as Joseph Beaver), the brother of Martin. According to Alphonse, a reserve was an unwelcome prospect to his great-uncle, since the latter didn't "want anybody to own him or he doesn't want to own the land."[55] The choice between treaty and scrip could be made freely by all who were at least 20 years of age, irrespective of the election made by other members of the same family,[56] and in 1968 the late Noel Boskoyous, himself a scrip recipient, recalled being allowed to make his choice at 18 because he had no living parents.[57]

However, there is evidence that, in some cases, the choice between treaty and scrip was not entirely free. Elder Louise Auger told the Commission of one woman who was denied the right to enter treaty because she "was a very fair lady, just like a white person."[58] As a result, both she and her husband were compelled to apply for scrip, even though they were Indians from Trout Lake.[59]

In 1899, 196 persons were paid gratuity and annuity as members of the Bigstone Band,[60] while 106 others received scrip at Wabasca and two other nearby locations.[61] The next year, 39 additional persons joined the Bigstone Band,[62] while 25 more were taken into treaty in 1901, most of them after making unsuccessful scrip applications.[63]

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[53] *"The Wabasca Tapes," Transcripts of 1968 Interviews with Seven Elders of the Bush Cree Nation, by Ray Yellowknee*, interview with Catherine [Gallifer] Auger (ICC Exhibit 1, p. 61).

[54] *"The Wabasca Tapes," Transcripts of 1968 Interviews with Seven Elders of the Bush Cree Nation, by Ray Yellowknee* interview with Martin Beaver (ICC Exhibit 1, p. 63)

[55] ICC Transcript, October 29, 1996, p. 16 (Alphonse Auger).

[56] *"The Wabasca Tapes," Transcripts of 1968 Interviews with Seven Elders of the Bush Cree Nation, by Ray Yellowknee*, interview with Martin Beaver (ICC Exhibit 1, p. 63).

[57] *"The Wabasca Tapes," Transcripts of 1968 Interviews with Seven Elders of the Bush Cree Nation, by Ray Yellowknee*, interview with Noel Boskoyous (ICC Exhibit 1, p. 135).

[58] ICC Transcript, October 29, 1996, p. 22 (Louise Auger).

[59] ICC Transcript, October 29, 1996, pp. 23-24 (Louise Auger).

[60] Cree Band at Wabasca, Annuity Paylist, August 14, 1899, NA, RG 10, vol. 9432 (ICC Exhibit 20B, doc. 33).

There is no doubt that the population which had entered treaty by 1901 was considerably smaller than that of the Bigstone communities. Elders advised the Commission that some of those who spent part of the year at Wabasca were absent hunting when Commissioner Ross visited, since they "had to go out in the bush to make their living to survive."[64] An even more significant cause for the less-than-comprehensive attendance at Wabasca in 1899 was the diffusion of the Bigstone population over a vast area of northern Alberta. According to elders, there was a certain randomness to attendance at the meeting with the Treaty Commissioner at Wabasca in 1899, since those in attendance were those who were there for some other purpose, such as trading furs.[65] Alphonse Auger told the Commission that only two of his paternal grandfather's four brothers entered treaty in 1899, the other two being at Trout Lake or Loon Lake.[66]

Historians of the "isolated communities" north of Wabasca have concluded that few residents of these communities entered Treaty 8 in its early years,[67] a conclusion borne out by the evidence of elders and other documentary sources. No Trout Lake residents entered treaty when the adhesion was signed at Wabasca in 1899 (although the man who the elders indicate was compelled to apply for scrip when his wife was denied the right to enter treaty was the grandson of Alexis Auger, who ran the HBC outpost at Trout Lake).[68] Two descendants of Alexis Auger entered treaty in 1900, one son becoming Number 62 of the Bigstone Band[69] and one grandson becoming the first (and only) member of the "Trout Lake Band,"[70] which disappeared the next year. Another grandson of Alexis Auger was taken into treaty in 1901 after his application for scrip was refused.[71] Elders interviewed at Chipewyan Lake in 1980 remembered that only two families from their community entered treaty in the early years of the 20th century,[72] although a study carried out in the 1970s indicated that five of the families who were taken into treaty in 1901 after their scrip applications were refused were from Chipewyan Lake.[73]

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[61] In 1899, 64 persons received scrip at Wabasca, 36 at the confluence of the Athabasca and Calling Rivers (Calling River Portage), and 6 at Pelican Portage on the Athabasca River. James Walker and Arthur Coté, Half-breed Commissioners, to Clifford Sifton, Minister of the Interior, September 30, 1899, NA, RG 15, vol. 771, file 518158, referred to in Reddekopp Report, January 1997 (ICC Exhibit 33, p. 8).

[62] Cree Band at Wabasca, Annuity Paylist, August 27, 1900, NA, RG 10, vol. 9433, Historical Documents from 1850–1989 (ICC Exhibit 20B, doc. 36).

[63] Cree Band at Wabasca, Annuity Paylist, August 1901, NA, RG 10, vol. 9434, Historical Documents from 1850–1989 (ICC Exhibit 20B, doc. 43).

[64] ICC Transcript, October 29, 1996, p. 22 (Louise Auger).

[65] ICC Transcript, October 29, 1996, p. 18 (Alphonse Auger).

[66] ICC Transcript, October 29, 1996, pp. 16-17 (Alphonse Auger).

[67] Patricia Sawchuk and Jarvis Gray, *The Isolated Communities of Northern Alberta* (Edmonton: Metis Association of Alberta, 1980) (ICC Exhibit 25, p. 273).

[68] Dominique Auger was the son of Jean Baptiste Auger, who was in turn the oldest son of Alexis Auger. Family Trees of those Persons in Categories A–G (ICC Exhibit 34B).

[69] Historical Documents from 1850–1989 (ICC Exhibit 20B, doc. 36).

[70] Cree Band at Trout Lake, Annuity Paylist, August 27, 1900, NA, RG 10, vol. 9433, referred to in Reddekopp Report, January 1997 (ICC Exhibit 33, p. 9).

The limited impact of the work of the Treaty and Scrip Commissions on the population of the "isolated communities" was not unknown to the Commissioners themselves. In 1900, J.A. Macrae was appointed sole Commissioner to complete the work begun in 1899, and when he made his report, he noted:

> There yet remains a number of persons leading an Indian life in the country north of Lesser Slave Lake, who have not accepted treaty as Indians, or scrip as half-breeds, but this is not so much through indisposition to do so as because they live at points distant from those visited, and are not pressed by want. The Indians of all parts of the territory who have not yet been paid annuity probably number about 500 exclusive of those in the extreme northwestern portion, but as most, if not all, of this number belong to bands that have already joined in the treaty, the Indian title to the tract it covers may be fairly regarded as being extinguished.[74]

Over the decade following Commissioner Macrae's report, few people from the "isolated communities" entered treaty with the Bigstone Band. The only adhesion from these communities took place in 1905, when four families from Chipewyan Lake numbering 15 people adhered to treaty.[75]

FIRST SURVEY OF RESERVES

When the Treaty Commissioners reported the results of their work in the summer of 1899, they noted the reluctance of many of the First Nations they met to the concept of reserves for residential purposes:

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[71] Historical Documents from 1850–1989 (ICC Exhibit 20B, doc. 43).

[72] Patricia Sawchuk and Jarvis Gray, *The Isolated Communities of Northern Alberta* (Edmonton: Metis Association of Alberta, 1980), interview with George Beaver and Bella Cutwing (ICC Exhibit 25, p. 371).

[73] Collection of Documents on Peerless Lake, History and Entitlement (ICC Exhibit 32, p. 3). This conclusion is not inconsistent with the recollection of the elders, since three of the unsuccessful applications in 1901 were made by members of the Papanes/Yellowknee family and two were by members of the Oar family.

[74] *Treaty No. 8, Made June 21, 1899, and Adhesions, Reports, Etc.* (1899; reprinted Ottawa: Queen's Printer, 1966), p. 21.

[75] Cree Band at Wabasca, Annuity Paylist, September 2, 1905, NA, RG 10, vol. 9438.

> [T]he Indians were generally averse to being placed on reserves. It would have been impossible to have made a treaty if we had not assured them that there was no intention of confining them to reserves. We had to very clearly explain to them that the provision of reserves and allotments of land were made for their protection, and to secure to them in perpetuity a fair portion of the land ceded, in the event of settlement advancing.[76]

At Wabasca, discussion of reserves was limited to the statement that reserve boundaries "would be developed in the future."[77]

Yet Wabasca was also one of those locations within Treaty 8 where, as early as the start of the 20th century, "settlement" was "advancing," although this advance was initially limited to the open plains at the elbow formed by North and South Wabasca Lakes.[78] Shortly after the signing of Treaty 8, this parcel of land was surveyed into 28 river lots and came to be known as "Wabasca Settlement." Declarations in support of applications for "free grants" of land, based on the occupation of and improvement to specific parcels of land prior to the signing of Treaty 8, established that eight of these lots were occupied by churches, fur traders, or individual Métis by 1899, and in the years that followed, three additional lots were taken up and applications were made for ownership of additional haylands.[79]

In order to "secure" to themselves a "fair portion" of land in the vicinity of Wabasca, members of the Bigstone Cree Nation staked out two reserves in 1909 and sought an early survey of the lands. Their application was endorsed by the inspector for Treaty 8, who supported the First Nation's contention that they were at risk of losing access to the "best land" in the vicinity. However, a marginal note made by the recipient of the inspector's report suggested that the matter could be deferred until 1911 or 1912.[80]

Over the three years that followed, local Métis applied for the ownership of an additional three lots in Wabasca Settlement,[81] and when the Indian agent for the Lesser Slave Lake Agency visited Wabasca in 1912 to pay annuity, he encountered considerable tension between the First Nation, on the one hand, and local Métis and fur traders, on the other, over the ownership of lands staked by the First Nation in 1909, but viewed by the others as community haylands.[82] The same year, the Bigstone Chief and Council wrote to the Department of Indian Affairs, repeating their request for an early survey.[83]

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[76] *Treaty No. 8, Made June 21, 1899 and Adhesions, Reports, Etc.*, DIAND Publication QS-0576-EE-A-16 (Ottawa: Queen's Printer, 1966). Treaty 8 is reprinted in (1995) 3 ICCP 87.

[77] "*The Wabasca Tapes,*" *Transcripts of 1968 Interviews with Seven Elders of the Bush Cree Nation, by Ray Yellowknee*, interview with Martin Beaver at p. 61, interview with Martin Beaver at p. 63 (ICC Exhibit 1)

[78] Community histories suggest that the tall grasses in this plain, which, when seen in contrast to the green of the nearby forest, appeared almost white, were responsible for the area's name (*Wapascow* being the Cree word for "white grass"). "*Kitaskeenow*: Cultural Land Use and Occupancy Study," report prepared by the Arctic Institute of North America, 1997 (ICC Exhibit 42, p. 71).

[79] Referred to in Reddekopp Report, January 1997 (ICC Exhibit 33, p. 10).

[80] H.A. Conroy, Inspector, Treaty 8, to Frank Pedley, Deputy Superintendent General of Indian Affairs, December 30, 1909, NA, RG 10, vol. 3979, file 156710-31, Historical Documents from 1850–1989 (ICC Exhibit 20B, doc. 48).

[81] Referred to in Reddekopp Report, January 1997 (ICC Exhibit 33, p. 11).

In August 1912, veteran Indian Affairs surveyor J.K. McLean was instructed to proceed to Wabasca and complete an immediate survey,[84] but the instructions arrived too late for him to complete the work within the 1912 season.[85] Surveys at Wabasca were included in instructions for 1913 given to surveyor McLean on April 1, 1913,[86] but he died suddenly less than two months later, before reaching Wabasca.[87] To replace McLean, Indian Affairs turned the Bigstone surveys over to I.J. Steele.[88] Unlike the experienced McLean, Steele had no background in the survey of Indian reserves and was hired primarily because of his availability – in 1913, he was carrying out township surveys on the north shore of Lesser Slave Lake.[89]

After consulting with the local Indian agent, Steele held a meeting with Chief Bigstone and his Council on July 9, 1913, at which, the surveyor recorded, it was agreed that he would set aside four reserves along the shores of the two Wabasca Lakes.[90] It appears that the Bigstone Chief and Council had considerable input into the selection of the lands. To this day, elders refer to the large parcel of land extending east from South Wabasca Lake to Sandy Lake (IR 166) as the "chief's reserve,"[91] while one of the councillors is credited with the selection of the land that was set apart as

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[82] Harold Laird, Assistant Indian Agent, Lesser Slave Lake Agency, to Secretary, Department of Indian Affairs, October 30, 1912, NA, RG 10, vol. 3979, file 156710-31, Historical Documents from 1850–1989 (ICC Exhibit 20B, doc. 58).

[83] Chief and Councillors of the Bigstone Band to Deputy Superintendent General of Indian Affairs, March 27, 1912, NA, RG 10, vol. 7778, file 27131-17, Historical Documents from 1850–1989 (ICC Exhibit 20B, doc. 50).

[84] J.D. McLean, Assistant Deputy and Secretary, Department of Indian Affairs, to J.K. McLean, DLS, August 19, 1912, NA, RG 10, vol. 7778, file 27131-17, Historical Documents from 1850–1989 (ICC Exhibit 20B, doc. 57).

[85] J.K. McLean, DLS, to Frank Pedley, Deputy Superintendent General of Indian Affairs, March 5, 1913, NA, RG 10, vol. 4019, file 279393-8, Historical Documents from 1850–1989 (ICC Exhibit 20B, doc. 59).

[86] J.D. McLean, Assistant Deputy and Secretary, Department of Indian Affairs, to J.K. McLean, DLS, April 1, 1913, NA, RG 10, vol. 4019, file 279393-8, Historical Documents from 1850–1989 (ICC Exhibit 20B, doc. 60).

[87] H.W. Fairchild to Frank Pedley, Deputy Superintendent General of Indian Affairs, May 25, 1913, NA, RG 10, vol. 4019, file 279393-8, Historical Documents from 1850–1989 (ICC Exhibit 20B, doc. 62).

[88] J.D. McLean, Assistant Deputy and Secretary, Department of Indian Affair to I.J. Steele, DLS, June 11, 1913, NA, RG 10, vol. 4019, file 279393-8, Historical Documents from 1850–1989 (ICC Exhibit 20B, doc. 65).

[89] Referred to in Reddekopp Report, January 1997 (ICC Exhibit 33, p. 12).

[90] I.J. Steele, DLS, Survey Diary, July 6–September 28, 1913, NA, RG 10, vol. 4019, file 279393-8, Historical Documents from 1850–1989 (ICC Exhibit 20B, doc. 68).

[91] ICC Transcript, October 29, 1996, p. 47 (Louise Auger).

IR 166A.[92] Although not yet a councillor,[93] Martin Beaver was the recognized leader of the Bigstone members living near the north end of North Wabasca Lake, and he provided Steele with instructions regarding the survey of lands there (IR 166C).[94] This last reserve appears to have been one of the parcels staked by Bigstone members in 1909, but the other 1909 parcel, being south and southwest of Wabasca,[95] was not included in any of the four reserves.

Third-party interests were important in determining the boundaries of the reserves surveyed by Steele in 1913. Elders recall how notches were introduced into IR 166C to exclude lands held by two Métis settlers along the Wabasca River and others who were located near where the Wabasca River runs out of North Wabasca Lake.[96] Improvements made to lands by third parties appear to have influenced the decision to divide the reserve land to be surveyed into four blocks, since Steele later reported that the policy of Indian Affairs to exclude third-party improvements from reserves made it impractical for him to try to contain all the lands occupied by Bigstone members in one block.[97]

It is unclear to what extent, if any, the surveyor took into account the nominal land entitlement of the Bigstone Cree Nation under the reserve clause of Treaty 8.[98] Elders consistently denied that anything was said about this matter at the time of the 1913 surveys. According to Alphonse Auger, "the surveyors didn't tell him [Martin Beaver] that they could only take land for so many people" and "[t]hey [the surveyors] never mentioned so many acres."[99] Daniel Beaver added: "when the surveyors came ... nobody ever asked me [quoting Martin Beaver] that this reserve was supposed to be according to the number of people, numbers."[100]

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[92] ICC Transcript, October 29, 1996, p. 26 (Louise Auger).

[93] The 1912 letter to Indian Affairs confirmed that, of the four councillors who executed the adhesion at Wabasca in 1899, two (Hilaire Wapoose and Louison Beaver) remained in office. The two councillors who had died since 1899 had been replaced by Philippe Capotvert [Young] and Barthelemay Capotvert [Crow]. Historical Documents from 1850–1989 (ICC Exhibit 20B, doc. 50).

[94] ICC Transcript, October 29, 1996, p. 14 (Alphonse Auger). It should be noted that Alphonse, the grandson of Martin Beaver, told the Commission that his grandfather had instructed Steele to include sone of the water of North Wabasca Lake into IR 166C. The water to be included was north of a line that connected the southwest and southeast corners of the reserve. ICC Transcript, October 29, 1996, pp. 15-16 (Alphonse Auger).

[95] Historical Documents from 1850–1989 (ICC Exhibit 20B, doc. 58).

[96] ICC Transcript, October 29, 1996, pp. 28-29 (Alphonse Auger).

[97] I.J. Steele, DLS, to J.D. McLean, Assistant Deputy and Secretary, Department of Internal Affairs, October 31, 1913, NA, RG 10, vol. 7778, file 27131-17, Historical Documents from 1850–1989 (ICC Exhibit 20B, doc. 69).

[98] This clause states, in part:

> And Her Majesty the Queen hereby agrees and undertakes to lay aside reserves for such bands as desire reserves, the same not to exceed in all one square mile for each family of five for such number of families as may elect to reside on reserves, or in that proportion for larger or smaller families.

[99] ICC Transcript, October 29, 1996, pp. 15, 21 (Alphonse Auger).

[100] ICC Transcript, October 29, 1996, p. 28 (Daniel Beaver).

Steele's own report does little to clarify the situation. He indicated that his overriding concern was to include all the homes of Bigstone members within the lands he surveyed, and his only reference to quantum was the advice that he surveyed "about sixty square miles" in the four reserves.[101] In fact, the four blocks totalled 37,352 acres, which was sufficient, under the reserve clause of Treaty 8, to satisfy the land entitlement of 291 persons.[102] When annuities were paid to members of the Bigstone Cree Nation about a month before Steele began his survey, they were paid to 281 persons,[103] and in subsequent years 50 persons received arrears for 1913.[104]

Because of the relative isolation of the Wabasca area and the policy of the Department of the Interior not to confirm reserves until they were connected to the nearest base line,[105] it was not possible for that department to respond immediately to the request by the Department of Indian Affairs for the passage of orders in council to confirm Steele's surveys.[106] In the end, IR 166B was confirmed in 1924, IR 166 and IR 166A in 1925, and IR 166C was not confirmed until May 15, 1930.[107]

POST-SURVEY ADHERENTS

After paying annuities in Wabasca in the autumn of 1911, Assistant Indian Agent Harold Laird, likely influenced by the lateness of the season, elected to proceed directly north to Fort Vermilion rather than take the much more circuitous route by way of the Peace River. Accordingly, he descended the Wabasca River to the mouth of the Trout River, then ascended the latter to the HBC outpost at Trout Lake to pay the small number of Bigstone members resident there.[108] Laird then continued north, following a trail along the west side of Graham and Peerless Lakes.[109] On the second day after leaving Trout Lake, Laird reached Equistem Lake, several miles north of Peerless Lake,[110] where

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[101] I.J. Steele, DLS, to J.D. McLean, Assistant Deputy and Secretary, Department of Indian Affairs, September 20, 1913, NA, RG 10, vol. 4019, file 279393-9, Historical Documents from 1850–1989 (ICC Exhibit 20B, doc. 66).

[102] Referred to in Reddekopp Report, January 1997 (ICC Exhibit 33, p. 13).

[103] Bigstone Band, Annuity Paylist, June 4, 1913, NA, RG 10, vol. 9450, Historical Documents from 1850–1989 (ICC Exhibit 20B, doc. 64).

[104] In 1914, 44 persons received arrears for 1913, while arrears for 1913 were paid to two persons in 1915 and four in 1925. Bigstone Band, Annuity Paylist, September 14, 1914, NA, RG 10, vol. 9452; Bigstone Band, Annuity Paylist, August 10, 1915, NA, RG 10, vol. 9454; Bigstone Band, Annuity Paylist, June 15, 1925, NA, RG 10, vol. 9474, Historical Documents from 1850–1989 (ICC Exhibit 20B, docs. 78, 79, and 103).

[105] Referred to in Reddekopp Report, January 1997 (ICC Exhibit 33, pp. 13-14).

[106] J.D. McLean, Assistant Deputy and Secretary, Department of Indian Affairs, to Secretary, Department of the Interior, April 24, 1914, NA, RG 10, vol. 7778, file 27131-17, Historical Documents from 1850–1989 (ICC Exhibit 20B, doc. 73).

[107] Orders in Council PC 332, March 3, 1924, PC 955, June 22, 1925, and PC 1025, May 15, 1930, Historical Documents from 1850–1989 (ICC Exhibit 20B, docs. 100, 104, 112).

[108] Referred to in Reddekopp Report, January 1997 (ICC Exhibit 33, p. 11).

> there was an encampment of Cree Indians, under Chief Everlasting Voice. I counted 11 teepees and would judge that the Band numbered between 45 and 50 people, none of whom have ever taken Treaty. I had a talk with the Chief, and have no doubt that he and his Band could be induced to enter Treaty, if the Department so desired.[111]

Despite Laird's recommendation, the department did not "so desire," and a marginal note on the letter responded "wait till Indians ask to be taken into Treaty."[112]

A decade passed before another suggestion was made to bring the population of the "isolated communities" within the membership of the Bigstone Cree Nation. In April 1922, Father Y.M. Floc'h, an Oblate missionary working out of Grouard who made at least an annual tour of the vast area north of there, wrote to the Minister of the Interior recommending that the "Pure Indians" he encountered during his travels be taken into treaty.[113] The Department of Indian Affairs acknowledged that, if the persons described by Father Floc'h had in fact not received scrip, they were entitled to adhere to Treaty 8, and Agent Laird was instructed to investigate the matter.[114] Upon Laird's confirmation that Father Floc'h's assertion was in fact accurate,[115] the agent was authorized to extend the benefits of treaty to "the Indians living North of Grouard who have not yet been taken into Treaty, and who have not been granted half-breed scrip."[116] Bigstone elder Alphonse Auger remembers the ensuing few years as a time when "the Bigstone Cree Nation was open."[117]

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[109] Harold Laird, Assistant Indian Agent, to Secretary, Department of Indian Affairs, October 30, 1911, NA, RG 10, vol. 3979, file 156710-31, Historical Documents from 1850–1989 (ICC Exhibit 20B, doc. 48).

[110] Daily Journal, Lesser Slave Lake Indian Agency, 1911, Glenbow-Alberta Institute Archives, accession M2218, referred to in Reddekopp Report, January 1997 (ICC Exhibit 33, p. 11).

[111] Historical Documents from 1850–1989 (ICC Exhibit 20B, doc. 48).

[112] Historical Documents from 1850–1989 (ICC Exhibit 20B, doc. 48).

[113] Y.M. Floc'h, omi, to Charles Stewart, Minister of the Interior and Superintendent General of Indian Affairs, April 5, 1922, NA, RG 10, vol. 7972, file 62-131, pt 1, Historical Documents from 1850–1989 (ICC Exhibit 20B, doc. 96).

[114] J.D. McLean, Acting Deputy Superintendent General of Indian Affairs, to Harold Laird, Acting Indian Agent, May 2, 1922, NA, RG 10, vol. 7972, file 62-131, pt 1, Historical Documents from 1850–1989 (ICC Exhibit 20B, doc. 97).

[115] In particular, Laird identified the area north of Peerless Lake as one spot where a number of potential adherents could be found. Harold Laird, Acting Indian Agent, Lesser Slave Lake Agency, to Assistant Deputy and Secretary, Department of Indian Affairs, May 9, 1922, NA, RG 10, vol. 7972, file 62-131, pt 1, Historical Documents from 1850–1989 (ICC Exhibit 20B, doc. 98).

Over the five years that followed the decision to admit adherents into the membership of the Bigstone Cree Nation, the number of persons who took advantage of this opportunity was small.[118] One reason for this was identified by Treaty Commissioner Macrae when he first discussed the population of the "isolated communities" in 1900. He noted that the people who had not entered treaty in 1899 and 1900 were "not yet pressed by want."[119] This situation remained unchanged through the mid 1920s, an extended period during which the fur trade was almost uniformly profitable for all involved.[120] This was particularly true in the area around Peerless Lake. In the words of Bigstone elder Tommy Auger,

> [t]he reason why people have lived around Peerless and the whole surrounding area is because it was rich in pelts, and people didn't have to go and look for a place to sell their furs. People came to them and traded or bought the furs.[121]

The same elder identified Chipewyan Lake as "an excellent area for trapping."[122] Competition kept prices high, as the French fur-trading firm Revillon Frères and independent traders opened up posts in competition with the HBC at Long Lake, Trout Lake, and Chipewyan Lake.[123]

In 1900, Commissioner Macrae downplayed open hostility to treaty, arguing that those who remained outside treaty were not motivated by "indisposition."[124] But the memories of modern elders and the observations of contemporaries certainly provide anecdotal evidence of the hostility of certain individuals, which may have had a considerable impact because of the influence of the persons in question.

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[116] J.D. McLean, Assistant Deputy Superintendent General of Indian Affairs, to Harold Laird, Acting Indian Agent, Lesser Slave Lake Agency, June 25, 1922, NA, RG 10, vol. 7972, file 62-131, pt 1, Historical Documents from 1850–1989 (ICC Exhibit 20B, doc. 98).

[117] ICC Transcript, July 3, 1997, p. 102 (Alphonse Auger).

[118] The Bigstone paylists for 1923 and 1925 do suggest that 60 persons from Long Lake and Chipewyan Lake adhered to treaty in these two years. However, research conducted on behalf of the Commission suggests that a substantial number of these purported adhesions did not place. Referred to in Reddekopp Report, January 1997 (ICC Exhibit 33, pp. 16, 31-33, and Appendix A, pp. 8-10).

[119] *Treaty No. 8, Made June 21, 1899 and Adhesions, Reports, Etc.*, DIAND Publication QS-0576-EE-A-16 (Ottawa: Queen's Printer, 1966), 21.

[120] Referred to in Reddekopp Report, January 1997 (ICC Exhibit 33, pp. 16-17).

[121] ICC Transcript, October 29, 1996, p. 67 (Tommy Auger).

[122] "*Kitaskeenow*: Cultural Land Use and Occupancy Study," report prepared by the Arctic Institute of North America, 1997 (ICC Exhibit 42, p. 79).

[123] Referred to in Reddekopp Report, January 1997 (ICC Exhibit 33, p. 17).

[124] Historical Documents from 1850–1989 (ICC Exhibit 20B, doc. 37).

In the late 1960s, elder August Auger recalled a trip he made to the Chipewyan Lake area in 1907 in the company of an Oblate missionary. The elder recalled vividly the opposition of Cutwing, an influential local resident, to the activities of the missionary and, by extension, the society the latter represented. Cutwing refused to assist in the baptism of the 15-year-old daughter of a friend, telling the girl that "the government and the church are trying to control you."[125] In 1980, Cutwing's octogenarian daughter recalled how her father had "hated for a long time to become a Treaty."[126] At Peerless Lake, the attitude of Okemow resembled that of Cutwing. In 1944, an Oblate missionary described Okemow as "a wild man" who "did not want to meet anyone."[127]

The northern Alberta fur trade declined by 30 per cent between 1925–26 and 1926–27 and did not recover in the years that followed.[128] It is not surprising that, now "pressed by want," residents from the "isolated communities" chose to accept the benefits of treaty. In 1928, 40 persons, 23 from Long Lake and 17 (including Cutwing) from Chipewyan Lake, adhered to Treaty 8,[129] and between 1929 and 1937, inclusive, another 50 persons from Chipewyan Lake, Long Lake, and Trout Lake entered treaty as members of the Bigstone Cree Nation.[130]

Although the Indian agent for the Lesser Slave Lake Agency descended the Wabasca River from Wabasca to Fort Vermilion on several occasions after he was authorized to accept adherents from the area through which the river ran,[131] adhesions between 1928 and 1937 took place at Wabasca. Elders from the "isolated communities" remember their fathers travelling to Wabasca to pick up their annuities.[132] Because of the distance that had to be travelled on this trip, communities would delegate to several individuals the responsibility of travelling to Wabasca to collect annuities for the entire community.[133] To be so selected must have been viewed as an honour, as elder

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[125] *"The Wabasca Tapes." Transcripts of 1968 Interviews with Seven Elders of the Bush Cree Nation by Ray Yellowknee*, interview with Martin Beaver (ICC Exhibit 1, p. 61). Interview with August Auger (ICC Exhibit 1, p. 54).

[126] ICC Exhibit 25, p. 375 (interview with George and Bella Beaver).

[127] In the Matter of OCPC 744 and In the Matter of an Enquiry into the Question of Membership of Certain Individuals in the Indian Bands of Lesser Slave Lake Agency, Notes of Evidence, 1944, DIAND, vol. 6811, file 470-3-6, p. 206 (Evidence of Father Giroux).

[128] Referred to in Reddekopp Report, January 1997 (ICC Exhibit 33, p. 17).

[129] Bigstone Band, Annuity Paylist, June 19, 1928, NA, RG 10, vol. 9480, referred to in Reddekopp Report, January 1997 (ICC Exhibit 33, pp. 18, 19).

[130] Referred to in Reddekopp Report, January 1997 (ICC Exhibit 33, p. 19).

[131] Referred to in Reddekopp Report, January 1997 (ICC Exhibit 33, p. 16).

[132] ICC Transcript, July 3, 1997, p. 8 (Solomon Noskiye), July 3, 1997, p. 100 (Arnold Orr).

[133] ICC Transcript, July 3, 1997, p. 9 (Johnny Noskiye).

Solomon Noskiye remembers his father putting on his best suit before setting out for Wabasca.[134]Another elder remembers that residents of the "isolated communities" were often recorded as absent, since they were not always told the date of annuity payments in time to reach Wabasca.[135]

The era of adhesions came to an end in 1938, when the Indian agent flew to Long Lake and accepted 25 persons into treaty.[136] Apart from women who gained status through marriage to members of the Bigstone Cree Nation, only a small number of persons adhered to the First Nation between 1913 and 1940. In 1941, however, Indian Agent N.P. L'Heureux accepted 39 persons into the membership of the Bigstone Cree Nation.[137] Eight of these people were men who had previously been considered non-Indians, but who were married to Bigstone members. The remaining 31 were children of these marriages.[138] When asked by the Department of Indian Affairs to explain his actions,[139] L'Heureux explained that, in addition to being married to Indian women, the eight men all lived an "Indian mode of life."[140]

SECOND SURVEY

As early as 1925, local missionaries were forwarding to the Department of Indian Affairs a request, made on behalf of the Bigstone First Nation, for additional reserve land at Wabasca.[141] In endorsing the request, Acting Indian Agent Laird noted: "There has been a large number of Indians taken into the Wabasca Band since the survey made in 1913, and the Band is entitled to more land."[142] This matter was reviewed by Indian Affairs, and this review determined that, after taking into account natural growth, 109 persons had joined the Bigstone Cree Nation by marriage or adhesion between 1913 and 1925, inclusive.[143]

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[134] ICC Transcript, July 3, 1997, p. 182 (Solomon Noskiye)

[135] ICC Transcript, July 3, 1997, pp. 101-02 (Arnold Orr)

[136] N.P. L'Heureux, Indian Agent, Report for June, July, and August, 1938, September 16, 1938, NA, RG 10, vol. 7972, file 62-131, pt 2, Historical Documents from 1850–1989 (ICC Exhibit 20B, doc. 150)

[137] Bigstone Band, Annuity Paylist, June 12-17, 1941, NA, RG 10, vol. 9257, referred to in Reddekopp Report, January 1997 (ICC Exhibit 33, p. 35)

[138] Referred to in Reddekopp Report, January 1997 (ICC Exhibit 33, p. 35)

[139] T.R.L. MacInnes, Secretary, Indian Affairs Branch, Department of Mines and Resources, to N.P. L'Heureux, Indian Agent, Lesser Slave Lake Agency, October 10, 1941, NA, RG 10, vol. 8062, file 777/28-3, pt 5, referred to in Reddekopp Report, January 1997 (ICC Exhibit 33, p. 35)

[140] N.P. L'Heureux, Indian Agent, Lesser Slave Lake Agency, to Secretary, Indian Affairs Branch, Department of Mines and Resources, February 21, 1942, NA, RG 10, vol. 8062, file 777/28-3, pt 5, referred to in Reddekopp Report, January 1997 (ICC Exhibit 33, p. 35)

[141] Alfred Rault, omi, to P.J. Guy, omi, July 30, 1925, NA, RG 10, vol. 7778, file 27131-17, Historical Documents from 1850–1989 (ICC Exhibit 20B, doc. 105)

[142] Harold Laird, Acting Indian Agent, to Assistant Deputy and Secretary, Department of Indian Affairs, December 26, 1925, NA, RG 10, vol. 7778, file 27131-17, Historical Documents from 1850–1989 (ICC Exhibit 20B, doc. 108)

No action was taken in 1926, and the issue arose again in 1931, when a proposal was made to add seven sections of reserve to the Bigstone Cree Nation's land base. This proposal was based on a review of the First Nation's treaty land entitlement from a strict date-of-first-survey approach, concluding that, based on the amount of land surveyed in 1913 and the number of Bigstone members paid annuity or arrears for that year, the First Nation was entitled to an additional 4480 acres of reserve. However, a handwritten marginal note added to the memorandum outlining the proposal noted that additional land was required for "non-treaty indians since [1913] received into the band."[144] Plans to survey additional land for the Bigstone Cree Nation were delayed for a number of years, for reasons ranging from lack of funds[145] to poor weather and high water.[146]

When conditions were favourable for a survey at Wabasca in 1937, the Surveyor General suggested that the total amount of additional reserve land to the Bigstone Cree Nation was entitled to be calculated.[147] This calculation was made, and the Indian Affairs Branch concluded that, in addition to a shortfall of 4480 acres at the time of the 1913 survey, the Bigstone Cree Nation was entitled to additional reserve land for the 213 persons who had joined the First Nation since 1913. Accordingly, the department determined that the Bigstone Cree Nation was entitled to an additional 31,744 acres of reserve land under Treaty 8.[148] Notwithstanding this calculation of the Bigstone Cree Nation's outstanding land entitlement, Indian Affairs approached Alberta about setting apart only an additional 6000 to 10,000 acres.[149] Survey instructions were not limited to this amount, although the surveyor was told to contact the department if he found more than 10,000 acres of appropriate land, so that consultations could be held with Alberta.[150]

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[143] D. Robertson, Chief Surveyor, Department of Indian Affairs, to Mr Awrey, February 4, 1926, NA, RG 10, vol. 7778, file 27131-17, Historical Documents from 1850–1989 (ICC Exhibit 20B, doc. 109).

[144] H.W. Fairchild to Chief Surveyor, Department of Indian Affairs, February 5, 1931, NA, RG 10, vol. 7778, file 27131-17, Historical Documents from 1850–1989 (ICC Exhibit 20B, doc. 116).

[145] Donald Robertson, Chief Surveyor, to Deputy Minister, Department of Indian Affairs, August 15, 1936, NA, RG 10, vol. 7778, file 27131-17, referred to in Reddekopp Report, January 1997 (ICC Exhibit 33, p. 20).

[146] Indian Agent's Diary, January 16, 1934, Glenbow-Alberta Institute Archives, accession M2218 (ICC Exhibit 20B, doc. 123); Donald Robertson, Chief Surveyor, to Deputy Minister of Indian Affairs, July 20, 1935, NA, RG 10, vol. 7778, file 27131-17, Historical Documents from 1850–1989 (ICC Exhibit 20B, doc. 127).

[147] F.H. Peters, Surveyor General and Chief, Hydrographic Service, to T.R.L. MacInnes, Secretary, Indian Affairs Branch, Department of Mines and Minerals, March 22, 1937, NA, RG 10, vol. 7778, file 27131-17, Historical Documents from 1850–1989 (ICC Exhibit 20B, doc. 132).

[148] H.W. McGill, Director of Indian Affairs, Indian Affairs Branch, Department of Mines and Resources, to J. Harvie, [Alberta] Deputy Minister of Lands and Mines, April 23, 1937, NA, RG 10, vol. 7778, file 27131-17, Historical Documents from 1850–1989 (ICC Exhibit 20B, doc. 135).

[149] Historical Documents from 1850–1989 (ICC Exhibit 20B, doc. 135).

From the time that requests for additional land at Wabasca were first made, it was clear that the Bigstone Cree Nation's primary need was for additional haylands.[151] Bigstone elders told of the need for lands for this purpose,[152] although they also recalled the crowding on the existing reserves.[153] Since 1925, it had been assumed that additional land for the Bigstone Cree Nation would be found north of South Wabasca Lake adjacent to one of the existing reserves,[154] although the Indian Commissioner warned as early as 1932 that settlers were taking up the available land in that area.[155]

By the time a surveyor arrived in Wabasca, he could find only 1000 acres of suitable land in the area mentioned in his instructions, and he proposed that he survey additional land southwest of Wabasca.[156] In selecting this land, the surveyor consulted with the local Indian agent[157] and, according to the memories of elders, with the Bigstone Chief and Council as well.[158] The Indian agent described the land surveyed as "fine farm land,"[159] and Bigstone elders attested to the agricultural capacity of the land.[160]

Although the land surveyed in 1937 was not confirmed as the 14,432.7-acre IR 166D until 1958,[161] Bigstone members began to make immediate use of it. Movement onto the surveyed parcel began in 1938,[162] and by the next year, it was the most populous of the Bigstone Reserves.[163]

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[150] F.H. Peters, Surveyor General and Chief, Hydrographic Service, Department of Mines and Resources, to B.F. Mitchell, ALS, June 5, 1937, NA, RG 10, vol. 7778, file 27131-17, Historical Documents from 1850–1989 (ICC Exhibit 20B, doc. 138).

[151] Historical Documents from 1850–1989 (ICC Exhibit 20B, docs. 105 and 108).

[152] ICC Transcript, October 29, 1996, pp. 43-44 (Tommy Auger).

[153] ICC Transcript, October 29, 1996, p. 33 (Rita Auger).

[154] Historical Documents from 1850–1989 (ICC Exhibit 20B, doc. 108).

[155] W.M. Graham, Indian Commissioner, to Secretary, Department of Indian Affairs, January 5, 1932, NA, RG 10, vol. 7778, file 27131-17, Historical Documents from 1850–1989 (ICC Exhibit 20B, doc. 121).

[156] Cecil Donnelly, DLS, to Surveyor General of Canada, Department of Mines and Resources, July 25, 1937, NA, RG 10, vol. 7778, file 27131-17, Historical Documents from 1850–1989 (ICC Exhibit 20B, doc. 140).

[157] N.P. L'Heureux, Indian Agent, Lesser Slave Lake Agency, Report on Wabasca Lake Band, August 9, 1937, NA, RG 10, vol. 7778, file 27131-17, Historical Documents from 1850–1989 (ICC Exhibit 20B, doc. 143).

[158] ICC Transcript, October 29, 1996, pp. 26-27 (Louise Auger).

[159] Historical Documents from 1850–1989 (ICC Exhibit 20B, doc. 143).

[160] ICC Transcript, October 29, 1996, p. 33 (Rita Auger), pp. 43-44 (Tommy Auger). However, Rita Auger also noted that, in the decades that followed the survey, much of the reserve has been flooded by beaver dams. ICC Transcript, October 29, 1996, p. 35 (Rita Auger).

[161] Order in Council PC 1058-931, July 4, 1958, Historical Documents from 1850–1989 (ICC Exhibit 20B, doc. 218).

[162] ICC Transcript, October 29, 1996, p. 32 (Rita Auger), p. 60 (Alphonse Auger).

[163] A 1939 census revealed that 83 Bigstone members lived on IR 166C, 82 on IR 166A, 52 on IR 166B, and 44 on IR 166. In contrast, 141 Bigstone members had taken up residence on the "new reserve." Bigstone Band, Annuity Paylist, June 13-19, 1939, NA, RG 10, vol. 9251, Historical Documents from 1850–1989 (ICC Exhibit 20B, doc. 154).

One unresolved question is why additional land was not surveyed in 1937, although contemporary documents and the memories of elders suggest some answers. According to elders Rita and Alphonse Auger, the surveyor was forced to cease work when he encountered the farms and haying operations of third parties.[164] The desire not to interfere with the interests of third parties apparently also led to the decision not to survey additional land adjacent to IR 166A and IR 166B,[165] and isolation contributed to the reluctance to survey haylands requested by Councillor Martin Beaver about 20 kilometres north of IR 166C.[166]

REQUESTS FOR RESERVES IN "ISOLATED COMMUNITIES"

When Indian Agent Napoleon L'Heureux visited Long Lake in 1938, he was presented with a request for a reserve for the Bigstone Cree Nation members resident in the area surrounding Peerless and Trout Lakes,[167] a request endorsed by the agent. L'Heureux was able to confirm that two separate parcels had been selected (one, on the east side of Graham Lake, was for residential purposes, and the other, surrounding Quitting [then known as Skunk] Lake, for haylands),[168] and the request was sufficiently specific to allow the agent to identify the legal description (down to the theoretical sections) of the lands selected.[169]

There is a longstanding tradition among elders that additional steps were taken to satisfy the request for reserve land. The late Colin Trindle, appointed as Bigstone headman for the area in 1937,[170] claimed until his death that a federal official "surveyed the land and he gave the land to us."[171] Current elders repeated Colin Trindle's assertion that the selected land was "pegged,"[172] but suggest that Trindle was provided with survey pegs and told to place them himself.[173] This was not an uncommon practice, and had in fact been followed when the Bigstone Cree Nation wished to select land near

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[164] ICC Transcript, October 29, 1996, p. 34 (Rita Auger).

[165] ICC Transcript, October 29, 1996, p. 43 (Tommy Auger).

[166] Historical Documents from 1850–1989 (ICC Exhibit 20B, doc. 145).

[167] Historical Documents from 1850–1989 (ICC Exhibit 20B, doc. 145).

[168] Conversation between Commission staff and Peerless Lake elders George Cardinal, Louis Cardinal, and Louise Smith, Peerless Lake, October 30, 1996.

[169] Historical Documents from 1850–1989 (ICC Exhibit 20B, doc. 145).

[170] Bigstone Band, Annuity Paylist, July 1-3, 1937, NA, RG 10, vol. 9245, Historical Documents from 1850–1989 (ICC Exhibit 20B, doc. 139).

[171] Peerless Lake Presentation to Indian Affairs, "And We Need Land: A Statement of Grievances by the Cree People of Peerless Lake, Alberta," December 1985, interview with Colin Trindle (ICC Exhibit 2, p. 53).

[172] ICC Transcript, July 3, 1997, p. 152 (Felix Noskiye).

[173] ICC Transcript, October 29, 1996, p. 42 (Alphonse Auger).

Wabasca in 1909.[174] Some elders advised the Commission that Trindle completed this process,[175] while others suggested that although Trindle began to place the pegs, he ran out of them before finishing his work and was unable to obtain more.[176] Still other elders suggest that Trindle was promised survey pegs but did not receive them,[177] or that he was promised that the land requested would be surveyed in the future.[178]

Whatever differences exist among the recollections of elders regarding the response to the 1938 request for reserve land, they agree that, even if Colin Trindle met with a surveyor in 1938, the latter left after the meeting and "never came back."[179] But this was not the end of the matter as far as Indian Affairs was concerned. In 1940, the inspector of Alberta Indian Agencies recommended that action be taken "without delay" to secure reserve land completely surrounding Long Lake, although the inspector did not explain his recommendation to set apart land in a spot other than those parcels selected in 1938.[180]

Although not as much attention was paid historically to the question of reserve land at Chipewyan Lake, the matter was not completely unaddressed. Elders remember persistent requests for a reserve "right in the settlement of Chipewyan Lake"[181] and a promise of reserve land in the vicinity.[182] In 1940, the inspector recommended that land be acquired from Alberta to establish a reserve which would completely surround Chipewyan Lake.[183]

MEMBERSHIP EXPULSIONS

Despite the large number of persons who entered treaty from the "isolated communities" in the 1920s and 1930s, the event that provoked a backlash from the Department of Indian Affairs was the admission of eight men and their children at Wabasca in 1941.[184] Shortly after learning of the Indian agent's actions in this regard, the department advised L'Heureux that

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[174] Historical Documents from 1850–1989 (ICC Exhibit 20B, doc 46)

[175] ICC Transcript, October 29, 1996, p 42 (Alphonse Auger)

[176] ICC Transcript, July 3, 1997, pp 190-92 (George Noskiye)

[177] ICC Transcript, October 29, 1996, p 42 (Rita Auger)

[178] ICC Transcript, October 29, 1996, p 46 (Louise Auger); ICC Transcript, October 29, 1996, pp 9-10 (Johnny Noskiye)

[179] ICC Transcript, October 29, 1996, p 42 (Alphonse Auger)

[180] C. Pant Schmidt, Inspector of Indian Agencies, Alberta Inspectorate, to Secretary, Indian Affairs Branch, Department of Mines and Resources, March 29, 1940, DIAND, file 777/30-1, Historical Documents from 1850–1989 (ICC Exhibit 20B, doc 161)

[181] ICC Transcript, July 3, 1997, p 96 (Arnold O'rr)

[182] ICC Transcript, July 3, 1997, p 92 (Arnold O'rr)

[183] Historical Documents from 1850–1989 (ICC Exhibit 20B, doc 161)

[184] Referred in Reddekopp Report, January 1997 (ICC Exhibit 33, p 35)

Malcolm McCrimmon, chief clerk of the Reserves and Trust Sections, had been appointed to accompany the agent on the latter's trip to pay annuities in 1942.[185]

Having formed the opinion, even before his arrival in Wabasca, that over the previous decades "a large number of half breeds" had been admitted to treaty,[186] it is hardly surprising that McCrimmon expelled the eight families admitted the previous year,[187] but he was far from finished. By the time he had visited Wabasca, Chipewyan Lake, and Long Lake, he had removed 256 persons from the Bigstone paylists, justifying his actions on the grounds that the persons he had removed were "non-Indians."[188]

Elders told the Commission of the heartbreak experienced by those who were removed. George Cardinal, who was six years old at the time he, his father, and his siblings were denied their annuities, remembered, "I cried because $5 then was a lot of money."[189] Positions of authority provided no protection against removal. Elzear O'rr told of the treatment of Joseph Cardinal, the Bigstone headman at Chipewyan Lake:

> So at that time Joe Cardinal was the representative from the Band. So he told me, like, he said that there was a Treaty happening in our house and Joe was translating for the people of Chipewyan Lake that day when those people came in and that's the time he got kicked out, Joe Cardinal got kicked out. He has to take off all his uniform as a Bigstone Band Councillor and he was kicked out of Treaty.[190]

Even the personal intervention of Chief Bigstone could not prevent McCrimmon's expulsions from touching the Chief's own family. Despite evidence that Chief Bigstone had raised his adopted son Aristide from shortly after the latter's birth,[191] Aristide Bigstone was expelled from treaty on the ground that his natural parents were non-Indian.[192] Elder Rita Auger recalled this event:

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[185] T.R.L. MacInnes, Secretary, Indian Affairs Branch, Department of Mines and Resources, to N. L'Heureux, Indian Agent, Lesser Slave Lake Agency, October 10, 1941, NA, RG 10, vol. 8062, file 777/28-3, pt 5, Historical Documents from 1850–1989 (ICC Exhibit 20B, doc. 296).

[186] Malcolm McCrimmon to D. J. Allen, Superintendent of Reserves and Trusts, Indian Affairs Branch, Department of Mines and Resources, June 2, 1942, NA, RG 10, vol. 8062, file 777/28-3, pt 5, referred to in Reddekopp Report, January 1997 (ICC Exhibit 33, p. 36).

[187] Bigstone Band, Annuity Paylist, June 12 and 13, 1942, NA, RG 10, vol. 9260, Historical Documents from 1850–1989 (ICC Exhibit 20B, doc. 167).

[188] Referred to in Reddekopp Report, January 1997 (ICC Exhibit 33, p. 36).

[189] ICC Transcript, July 3, 1997, p. 172 (George Cardinal).

[190] ICC Transcript, July 3, 1997, p. 90 (Elzear O'rr).

[191] Referred to in Reddekopp Report, January 1997 (ICC Exhibit 33, Appendix E, p. 1).

[192] Historical Documents from 1850–1989 (ICC Exhibit 20B, doc. 167).

> Well, he [Aristide] was treaty because he was adopted by Indian custom. I guess he [Chief Bigstone] married this woman and the woman had a boy already. Then he [the Chief] adopted this boy Aristide Bigstone ... He was on the band list for a while, and that is when he was struck off the list ... And they were known as non-treaties because ... maybe he [McCrimmon] didn't recognize the Indian custom. But he was – because it says in there that the chief had adopted him, and that he had a number, the chief's number to begin with.[193]

Some of the families removed in 1942 petitioned or wrote personally to Ottawa, seeking a reconsideration of McCrimmon's expulsions.[194] They were supported by letters from Chief Bigstone, the members of Parliament for Athabasca and Peace River, and a local missionary.[195]

In response to the outcry, the Minister of Mines and Resources appointed Justice W.A. MacDonald of the Supreme Court of Alberta to conduct an inquiry to determine "who is or is not a member of any band of Indians."[196] Justice MacDonald spent six days gathering evidence in Wabasca, hearing evidence from the Bigstone Chief, councillors, and elders, many of the persons expelled and their relatives, missionaries, and other witnesses. After returning to Edmonton and hearing legal arguments from counsel for the Department of Indian Affairs and a lawyer appointed to represent those removed from treaty throughout the Lesser Slave Lake Agency, Justice MacDonald completed his report in August 1944.[197]

Justice MacDonald recommended that 143 persons removed from membership in the Bigstone Cree Nation be reinstated.[198] After reviewing the recommendations, the Indian Affairs Branch reinstated 119 of those recommended.[199] The cases reviewed by Justice MacDonald and the differences between his recommendations and the Indian Affairs Branch's decisions were discussed in a historical report prepared for the Commission,[200] but this issue had not been considered when the Inquiry was suspended.

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[193] ICC Transcript, October 29, 1996, p. 41 (Rita Auger).

[194] Petition of Joseph Houle, Bernard Houle, et al., July 24, 1942; Daniel Houle to Superintendent General, Department of Indian Affairs, August 14, 1942, DIAND, vol. 8062, file 777/28-3, pt 6, referred to in Reddekopp Report, January 1997 (ICC Exhibit 33, p. 37).

[195] Chief Joseph Bigstone to Superintendent General, Department of Indian Affairs, June 17, 1942, NA, RG 10, vol 8062, file 777/28-3, pt 5, Historical Documents from 1850–1989 (ICC Exhibit 20B, doc. 169); J.M. Dechene, MP Athabasca, to T.A. Crerar, Minister of Mines and Resources, August 25, 1942, and J.H. Sissons, MP Peace River, to T.A. Crerar, Minister of Mines and Resources, December 15, 1943, NA, RG 10, accession 83-84/066, box 21, file 777/1-1, pt 1, referred to in Reddekopp Report, January 1997 (ICC Exhibit 33, pp. 37, 39-40); L. Beuglet, omi, to H.W. McGill, Director, Indian Affairs Branch, Department of Mines and Resources, June 30, 1942, NA, RG 10, vol. 8062, file 777/28-3, pt 5, Historical Documents from 1850–1989 (ICC Exhibit 20B, doc. 170).

[196] Order in Council PC 1944-3744, May 19, 1944, Historical Documents from 1850–1989 (ICC Exhibit 20B, doc. 311).

[197] Justice W.A. MacDonald to T.A. Crerar, Minister of Mines and Resources, August 7, 1944, DIAND, file 777/28-3, vol. 7, Historical Documents from 1850–1989 (ICC Exhibit 20B, doc. 173).

[198] Historical Documents from 1850–1989 (ICC Exhibit 20B, doc. 173).

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The final addition to the Bigstone Cree Nation's land base was a 507.5-acre parcel of land at Calling Lake, set apart for the First Nation in 1966.[201] While advising that this reserve "belongs to Bigstone," elders confirmed that it had originally been established "for one family," that of Jean Baptiste Gambler.[202]

The daughters of Jean Baptiste Gambler advised the Commission that their father had been born at Lac La Biche,[203] and his father, Louison Matchemuttaw, was a signatory to Treaty 6 as a headman of the Peeyaysis (Lac La Biche) Band at Fort Pitt on September 9, 1876.[204] Jean Baptiste Gambler moved to Calling Lake at some point before the birth of most of his children,[205] and in fact probably before 1899. The Matchemuttaw/Gambler family was absent from Lac La Biche on a consistent basis as early as the 1880s,[206] and Peeyaysis Band annuity paylists indicate that the family was living within the boundaries of Treaty 8 as early as 1883.[207] In a statutory declaration sworn in 1915, Jean Baptiste Gambler indicated that he had wintered in the Calling Lake area since 1885.[208]

Members of the Matchemuttaw/Gambler family were virtually the only Peeyaysis Band members who did not discharge from treaty in order to apply for scrip in 1886, and in 1911 Louison Matchemuttaw and Jean Baptiste

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[199] Minister of Mines and Resources, Ministerial Orders, April 17, 1945, DIAND, file 777/28-3, pt 7, Historical Documents from 1850–1989 (ICC Exhibit 20B, docs. 316-319). Minister of Mines and Resources, Ministerial Order, November 30, 1945, DIAND, file 777/28-3, pt 8, Historical Documents from 1850–1989 (ICC Exhibit 20B, doc. 321).

[200] Referred to in Reddekopp Report, January 1997 (ICC Exhibit 33, pp. 35-48, and Appendices C, D, and E).

[201] Order in Council PC 1966-2392, December 22, 1966, Historical Documents from 1850–1989 (ICC Exhibit 20B, doc. 225).

[202] ICC Transcript, October 29, 1996, pp. 42-43 (Rita Auger).

[203] ICC Transcript, July 3, 1997, p. 110 (Mary Jane Pichie).

[204] Referred to in Reddekopp Report, January 1997 (ICC Exhibit 33, p. 26). Louison Matchemuttaw's position as a Peeyaysis likely explains the treaty medal that Jean Baptiste Gambler's daughters shared with the Commission at a community session on July 3, 1997. ICC Transcript, July 3, 1997, pp. 115-17 (Mary Jane Pichie).

[205] The Commission heard evidence that Jean Baptiste Gambler had been married twice and had more than 20 children, 17 of whom were born to his second wife. All the children of the second marriage were born at Calling Lake. ICC Transcript, July 3, 1997, pp. 110, 118 (Mary Jane Pichie).

[206] Referred to in Reddekopp Report, January 1997 (ICC Exhibit 33, p. 26).

[207] Lac La Biche Band, Annuity Paylist, October 3, 1888, NA, RG 10, vol. 9421, Historical Documents from 1850–1989 (ICC Exhibit 20B, doc. 7).

[208] Jean Baptiste Gambler, Statutory Declaration, September 2, 1915, PAA, accession 74.32, file 3505385, Historical Documents from 1850–1989 (ICC Exhibit 20B, doc. 80).

Gambler transferred to the Bigstone Cree Nation, becoming Numbers 104 and 105, respectively.[209] Both families were absent in 1913, the year in which reserves were first surveyed at Wabasca.[210]

In September 1915, Jean Baptiste Gambler applied for a free grant to a two-square-mile parcel of land at Calling Lake, claiming that he had been in possession of the land claimed and had made improvements on it prior to the signing of Treaty 8. Although the form of application made by him was that usually used in homestead applications, Jean Baptiste Gambler noted in his statutory declaration that, following consultations with the Treaty 8 inspector, he claimed the land in question as a "reserve" for his family.[211]

The Department of Indian Affairs supported Jean Baptiste Gambler's application; however, somewhat surprisingly in light of the fact that the application was made on behalf of the Gambler family, the department calculated the land to which the family was entitled under the reserve rather than the severalty provision of Treaty 8.[212] For reasons not expressed, Indian Affairs advised the Department of the Interior in January 1919 that the 11 members of the Gambler family[213] required a reserve of only one square mile.[214] When the parcel of land specified by Indian Affairs was surveyed, some of it was found to be under the waters of Calling Lake, and the Order in Council setting aside IR 183 in severalty for the Jean Baptiste Gambler family established the size of the reserve as 507.5 acres.[215]

Jean Baptiste Gambler lived on IR 183 until his death and, as his family grew (a 1939 census revealed that 24 Bigstone Cree Nation members lived on the reserve),[216] he made several unsuccessful applications for additional land.[217] In 1966, a decade after his death, the Bigstone Cree Nation passed a

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[209] Bigstone's Band, Annuity Paylist, September 5, 1911, NA, RG 10, vol. 9446, Historical Documents from 1850–1989 (ICC Exhibit 20B, doc. 47).

[210] Historical Documents from 1850–1989 (ICC Exhibit 20B, doc. 64).

[211] Historical Documents from 1850–1989 (ICC Exhibit 20B, doc. 80).

[212] J.D. McLean, Assistant Deputy and Secretary, Department of Indian Affairs, to N.O. Coté, Controller, Land Patents Branch, Department of the Interior, May 2, 1916, DIAND, file 777/30-17-183 (ICC Exhibit 20B, doc. 287). Under Treaty 8, the size of reserves held in common is calculated on the basis of 128 acres per person and severalty lands are to be provided on the basis of 160 acres per person. Historical Documents from 1850–1989 (ICC Exhibit 20B, doc. 31).

[213] N.O. Coté, Controller, Land Patents Branch, to H.B. Perrin, Dominion Lands Branch, Department of the Interior, April 22, 1918, PAA, accession 74.32, file 3505385, Historical Documents from 1850–1989 (ICC Exhibit 20B, doc. 88).

[214] J.D. McLean, Assistant Deputy and Secretary, Department of Indian Affairs, to N.O. Coté, Controller, Land Patents Branch, Department of the Interior, January 14, 1919, PAA, accession 74.32, file 3505385, Historical Documents from 1850–1989 (ICC Exhibit 20B, doc. 89).

[215] Privy Council Order PC 201897, April 29, 1919, Historical Documents from 1850–1989 (ICC Exhibit 20B, doc. 90).

[216] Historical Documents from 1850–1989 (ICC Exhibit 20B, doc. 154).

[217] ICC Transcript, July 3, 1997, pp. 118, 119 (Mary Jane Pichie).

Band Council Resolution asking that IR 183 be set aside for the First Nation.[218] The Superintendent of the Lesser Slave Lake Agency endorsed this suggestion, noting the long affiliation of Jean Baptiste Gambler with the Bigstone Cree Nation and the unanimous support of the Gambler descendants for the proposal.[219] Accordingly, an Order in Council passed on December 22, 1966, set aside the Jean Baptiste Gambler Reserve for the use and benefit of "the Wabasca (Bigstone) Band of Indians."[220]

Surviving children of Jean Baptiste Gambler remember the events of the 1960s somewhat differently. They advised the Commission that their father was affiliated with Bigstone only for the purpose of annuity payments, and they have no recollection of signing any papers consenting to the 1966 Order in Council.[221]

PERCEPTION OF CONTINUING SHORTFALL

Bigstone elders were consistent in their view that the survey of additional land at Wabasca in 1937 left a substantial amount of unfinished business regarding the treaty land entitlement of the Bigstone Cree Nation. According to Rita Auger, a surveyor was to return in 1938 to set aside additional land,[222] but this never took place. Louise Auger spoke of repeated requests for additional reserve land,[223] and Alphonse Auger told of one specific meeting at which Councillor Martin Beaver was told by a government official that the Bigstone Cree Nation was entitled to an additional 20,000 acres of land.[224]

Documentary records indicate that, for several decades, the view that the Bigstone Cree Nation was entitled to additional reserve land was shared by Indian Affairs officials. The 1937 survey included less than half the land to which federal officials had determined the First Nation was entitled.[225] In early 1949, recommendations that IR 166C be extended by 14,000 acres were made by the assistant Indian agent resident in Wabasca[226] and the superintendent of the Lesser Slave Lake Agency,[227] and later the same year the former repeated his recommendation, suggesting at that time that 15,360 acres be added to IR 166C.[228] In supporting the proposal, the regional supervisor of Indian Agencies expressed the hope that the survey could be included in the budget for the next fiscal year.[229]

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[218] Bigstone Band Council Resolution, February 2, 1966, Historical Documents from 1850–1989 (ICC Exhibit 20B, doc. 223).

[219] J.R. Wild, Superintendent, Lesser Slave Lake Agency, to Indian Affairs Branch, Department of Indian Affairs and Northern Development, October 29, 1965, DIAND, file 777/30-17-183, Historical Documents from 1850–1989 (ICC Exhibit 20B, doc. 221).

[220] Historical Documents from 1850–1989 (ICC Exhibit 20B, doc. 225).

[221] ICC Transcript, July 3, 1997, p. 113 (Mary Jane Pichie).

[222] ICC Transcript, October 29, 1996, p. 57 (Rita Auger).

[223] ICC Transcript, October 29, 1996, p. 56 (Louise Auger).

[224] ICC Transcript, October 29, 1996, pp. 58-59 (Alphonse Auger).

[225] Historical Documents from 1850–1989 (ICC Exhibit 20B, doc. 138).

[226] L. Basler, Assistant Indian Agent, Wabasca Reserve, to G.S. Lapp, Superintendent, Lesser Slave Lake Agency, Indian Affairs Branch, Department of Mines and Resources, February 10, 1949, DIAND, file 777/30-17, vol. 2, referred to in Reddekopp Report, January 1997 (ICC Exhibit 33, p. 28).

The assistant Indian agent made an even more specific recommendation for a survey of additional land at Wabasca in 1953, when he forwarded to the superintendent of the Lesser Slave Lake Agency a sketch showing the addition of 24 sections (15,360 acres) to IR 166C.[230] The regional supervisor again endorsed the recommendation, referring to the 1937 conclusion that additional land was owed to the Bigstone Cree Nation after the completion of the survey in that year.[231]

In 1970 a regional official bypassed Ottawa and contacted the Alberta Department of Lands and Forests to advise that "it would appear that the Wabasca Band have [sic] a further land entitlement, the acreage of which is unknown."[232] Upon learning of this action, the regional official in question was advised by Ottawa that the question of how much, if any, land was still owing to the Bigstone Cree Nation was under review.[233] This review was not completed for several years, but in 1974, the Alberta Region was informed that a preliminary review suggested that the Bigstone Cree Nation had received all the land to which it was entitled under Treaty 8.[234] In reaching this conclusion, Indian Affairs officials calculated the First Nation's land entitlement at first survey based on its population in 1909, the year in which the first request for a reserve had been made.[235] The provision of additional land in 1937 was explained as a case in which reserve land was provided on an *ex gratia* basis to compensate for post-survey population growth, notwithstanding the fact that the First Nation's treaty land entitlement had already been satisfied.[236] Upon the completion of the review begun in 1971, the then Minister of Indian Affairs advised Alberta that the Bigstone Cree Nation was one of the Alberta First Nations to which no additional reserve land was owed.[237]

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[227] G.S. Lapp, Superintendent, Lesser Slave Lake Agency, to G.H. Gooderham, Regional Supervisor of Indian Agencies, Indian Affairs Branch, Department of Mines and Resources, March 5, 1949, DIAND, file 777/30-17, vol. 2, referred to in Reddekopp Report, January 1997 (ICC Exhibit 53, p. 28).

[228] L. Basler, Assistant Indian Agent, Wabasca Reserve, to G.S. Lapp, Superintendent, Lesser Slave Lake Agency, Indian Affairs Branch, Department of Mines and Resources, September 7, 1949, DIAND, file 777/30-17, vol. 2, Historical Documents from 1850–1989 (ICC Exhibit 20B, doc. 183).

[229] G.H. Gooderham, Regional Supervisor of Indian Agencies, to D.J. Allen, Superintendent of Reserves and Trusts, Indian Affairs Branch, Department of Mines and Resources, September 28, 1949, DIAND, file 777/30-17, vol. 2, Historical Documents from 1850–1989 (ICC Exhibit 20B, doc. 185).

[230] James L. Ingram, Assistant Indian Agent, to G.S. Lapp, Superintendent, Lesser Slave Lake Agency, Indian Affairs Branch, Department of Citizenship and Immigration, January 9, 1953, DIAND, file 777/30-17, vol. 2, Historical Documents from 1850–1989 (ICC Exhibit 20B, doc. 187). It is likely that the land that Assistant Agent Ingram suggested in 1953 (sections 1–24 of Township 82 range 1 west of the 5th meridian) was the same land that his predecessor, L. Basler, had recommended in September 1949. Historical Documents from 1850–1989 (ICC Exhibit 20B, doc. 183).

[231] G.H. Gooderham, Regional Supervisor of Indian Agencies, to Director, Indian Affairs Branch, Department of Citizenship and Immigration, January 20, 1954, DIAND, file 777/30-17, vol. 2, Historical Documents from 1850–1989 (ICC Exhibit 20B, doc. 192).

[232] W.H. Thrall, Regional Land Administration Officer, Department of Indian Affairs and Northern Development – Alberta, to J. Paley, Timber Manager Branch, [Alberta] Department of Lands and Forests, November 27, 1970, DIAND, vol. 777/30-1, Historical Documents from 1850–1989 (ICC Exhibit 20B, doc. 232).

[233] H.R. Phillips, Acting Head, Land Titles Section, to W.H. Thrall, Regional Land Administration Officer, Department of Indian Affairs and Northern Development – Alberta, February 9, 1971, DIAND, file 777/30-1, Historical Documents from 1850–1989 (ICC Exhibit 20B, doc. 234).

Residents of the "isolated communities" experienced similar frustrations. Colin Trindle persisted, largely unaided, in his attempts to obtain a reserve at Peerless and Trout Lakes,[238] and elders who met with the Commission expressed regret that the residents of the communities had not paid more attention to this struggle.[239]

It is possible that efforts to obtain land in the "isolated communities" and the attempts by Jean Baptiste Gambler to expand the reserve at Calling Lake were unsuccessful in part because of a misunderstanding as to the permanence of these communities. In 1939, the inspector of Alberta Indian Agencies recommended that an additional 15,000 or even 30,000 acres be surveyed at Wabasca in anticipation of the time when "stragglers from Chipewyan Lake, Long Lake and Calling Lake" would move to Wabasca.[240]

In more recent years, attempts to secure reserves at Peerless and Trout Lakes ran afoul of the conclusion reached by Indian Affairs in the 1970s that the Bigstone Cree Nation had received all the land to which it was entitled under Treaty 8. In 1973, a Member of Parliament sought information from the Minister of Indian and Northern Affairs as to why the 1938 recommendation for reserves at Peerless and Trout Lakes had not resulted in the creation of reserves.[241] The Minister responded that, although there had been some correspondence regarding the proposed reserve, there was no record of a commitment to provide it. Further, the Minister was satisfied that land set apart in the past "more than satisfies the [Bigstone] Band's entitlement," and that, accordingly, land could only be provided in the "isolated communities" if an equivalent amount of "surplus" land was surrendered at Wabasca.[242]

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[234] G.A. Poupore, Manager, Indian Lands, to W.H. Thrall, Regional Land Administrator, Alberta Region, Department of Indian and Northern Affairs, November 15, 1974, DIAND, file 777/30-17, vol. 2, Historical Documents from 1850–1989 (ICC Exhibit 20B, doc. 245).

[235] Historical Documents from 1850–1989 (ICC Exhibit 20B, doc. 46).

[236] G.A. Poupore, Manager, Indian Lands, to W. Fox, Operations Branch, Department of Indian and Northern Affairs, February 6, 1975, DIAND, file 777/28-3, pt 6, referred to in Reddekopp Report, January 1997 (ICC Exhibit 33, p. 30).

[237] Judd Buchanan, Minister of Indian and Northern Affairs, to Lou Hyndman, [Alberta] Minister of Federal and Intergovernmental Affairs, June 20, 1975, DIAND, file 777/28-3, pt 6, referred to in Reddekopp Report, January 1997 (ICC Exhibit 33, p. 30).

[238] Peerless Lake Presentation to Indian Affairs, "And We Need Land: A Statement of Grievances by the Cree People of Peerless Lake, Alberta," December 1985, interview with Colin Trindle (ICC Exhibit 2, pp. 54-56); ICC Transcript, July 3, 1997, p. 188 (Solomon Noskiye).

[239] ICC Transcript, July 3, 1997, pp. 170, 174 (George Cardinal).

[240] C. Pant Schmidt, Inspector of Indian Agencies, Alberta Inspectorate, to Secretary, Indian Affairs Branch, Department of Mines and Resources, August 16, 1939, NA, RG 10, vol. 7778, file 27131-17, Historical Documents from 1850–1989 (ICC Exhibit 20B, doc. 155). Interestingly, the Inspector made this recommendation about the same time that he recommended the survey of reserves completely surrounding Long and Chipewyan Lakes. Historical Documents from 1850–1989 (ICC Exhibit 20B, doc. 61).

Witnesses meeting the Commission were of the view that there is no "surplus" reserve land at Wabasca, for the purposes of exchange or otherwise. Population growth, particularly as a result of the 1985 amendments to the *Indian Act*[243] known as "Bill C-31," have heightened the perception that the Bigstone Cree Nation has insufficient land for its current and future needs.[244] Louise Auger spoke of the increasing frustration felt by elders:

> I have been working with land claims here for how long. The way I felt, it seems like it was going forever and ever that we wouldn't get no answer, but I said to myself, if they are going to be taking their time, I am going to ask the Lord to leave me here for a while yet to help out to get the land that we want. We need land.[245]

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[241] Paul Yewchuk, MP Athabasca, to Jean Chrétien, Minister of Indian and Northern Affairs, February 26, 1973, Historical Documents from 1850–1989 (ICC Exhibit 20B, doc. 239).

[242] Jean Chrétien, Minister of Indian and Northern Affairs, to Paul Yewchuk, MP Athabasca, May 29, 1973, DIAND, file 777/30-1, Historical Documents from 1850–1989 (ICC Exhibit 20B, doc. 244).

[243] SC 1985, c. 27.

[244] ICC Transcript, October 29, 1996, pp. 46 and 128 (Louise Auger); ICC Transcript, October 29, 1996, p. 128 (Rita Auger); ICC Transcript, July 3, 1997, p. 130 (George Yellowknee).

[245] ICC Transcript, October 29, 1996, p. 26 (Louise Auger).

PART III

ISSUES

The list of issues as agreed on by the parties, prior to the acceptance by Canada of the claim for negotiation, was as follows:

(1) Without prejudice to other positions of the Bigstone Cree Nation ("BCN") regarding the use of current population for the purposes of land entitlement pursuant to Treaty No. 8, and for the purposes of the present Inquiry in the context of reports of the Indian Claims Commission, which of the following approaches should be used in determining the TLE claim of the BCN?

- (i) Should 1913 be considered the "Date of First Survey"?
- (ii) Other Dates of First Survey or other criteria based on the particular historical and contemporary facts and circumstances of the BCN;
- (iii) Should there considered to be separate Dates of First Survey for each geographically isolated community of the BCN;

(2) What categories of individuals are entitled to be counted for treaty land entitlement purposes?

- (i) Those people contemplated by the 1983 ONC Guidelines and other similar criteria including absentees, late and new adherents, landless transferees, and non-treaty Indian women marrying in?
- (ii) Individuals struck from the paylists as a result of the McCrimmon/McKeen inquiries, in particular:

(a) Individuals struck from the paylist as a result of the inquiries but not reinstated notwithstanding that they were recommended for reinstatement by Mr. Justice MacDonald;

(b) Individuals struck from the paylist as a result of the inquiries and not recommended for reinstatement by Mr. Justice MacDonald?

(iii) Individuals who are identified as being part of the Bigstone Cree Nation as at the appropriate date of calculation but are not included at that time or subsequently in the BCN Treaty Paylists?

(3) Applying the principles of treaty land entitlement described above in the context of the particular historical and contemporary facts and circumstances of the BCN, does Canada owe additional land to the BCN pursuant to Treaty No. 8?

(4) Has Canada breached any fiduciary, legal, equitable or other obligation or duties to the BCN in the implementation of its obligations to provide the land entitlement of the BCN under Treaty No. 8? In particular, have these breaches, if any, been a result of the arguments or facts raised in the following subsections of the "Supplementary Brief submitted to the Department of Justice with respect various matters relating to the TLE claim of the Bigstone Cree Band of December 14, 1995":

"5.1 It is relevant to the work being carried-out by the Department of Justice that the fiduciary obligations of the Crown as regards the implementation of Treaty obligations be at the forefront of any review.

5.2 This is of greatest importance in regard to the unilateral change in policies of Government exemplified by the unilateral amendments to the 1983 Guidelines and, of more relevance, the level of reliance and expectations put forward by the letter from former Assistant Deputy Minister Richard Van Loon.

5.3 The obligations of the Crown to meet its obligations under Treaty are constitutionally protected under the *Constitution Act, 1982* and are confirmed by the Courts as being fiduciary obligations which must be respected.

5.4 The analysis put forward by the Indian Claims Commission in regard to the *Fort McKay Report* is directly applicable to this situation and Bigstone accepts and supports the analysis with respect to the change in Guidelines from the 1983 version to 1993.

5.5 It further makes the point that in regard to the specific situation as regards Bigstone, the signature of the Memorandum of Intent in 1993 (Annex A) by Canada at the same time as it was both changing the criteria for Entitlement and had put forward the letter from then acting Assistant Deputy Minister Richard Van Loon, further brings into doubt the fiduciary obligations of the Crown and raises additional questions which support the proposition that the 1983 ONC Guidelines in fact should apply."

PART IV

CONCLUSION

On October 13, 1998, the Minister of Indian Affairs and Northern Development informed the Chief of the Bigstone Cree Nation that the federal government had accepted the Bigstone treaty land entitlement claim for negotiation, on the basis that there was a TLE shortfall. This acceptance was a result of the new TLE policy, which was approved by the Cabinet in April 1998; that policy was in part the result of the Commission's recommendations in its report on the treaty land entitlement claim of the Fort McKay First Nation.[246]

Accordingly, the Commission has suspended its inquiry and wishes the parties well in their negotiations towards a settlement. The Commission remains ready to assist the parties, should its services be required in the negotiations.

FOR THE INDIAN CLAIMS COMMISSION

P.E. James Prentice, QC Commission Co-Chair	Daniel J. Bellegarde Commission Co-Chair	Carole T. Corcoran Commissioner

Dated this 20th day of March, 2000.

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[246] Indian Claims Commission, *Inquiry into the Treaty Land Entitlement Claim of the Fort McKay First Nation* (Ottawa, December 1995), reported (1996) 5 ICCP 3.

APPENDIX A

DIAND, PRESS RELEASE, APRIL 30, 1998

CANADA BROADENS APPROACH TO HISTORIC TREATY LAND ENTITLEMENTS

OTTAWA (April 30, 1998) – Jane Stewart, Minister of Indian Affairs and Northern Development, announced today that Canada has broadened the way it calculates historic Treaty Land Entitlement (TLE) shortfalls. The move comes in response to recommendations made by the Indian Claims Commission (ICC).

The new approach to TLEs is consistent with the government's commitment to improve the specific claims process. "Negotiated TLE settlements provide land and capital to enable First Nations to launch economic development initiatives that strengthen their economies and their communities," said Minister Stewart. "As we recently committed to in *Gathering Strength – Canada's Aboriginal Action Plan*, this is a positive step toward reconciliation in our relationship with First Nations."

The treaties between Aboriginal people and the Crown were vehicles for arranging the basis of the relationship between them. The importance of treaties is confirmed by the recognition of treaty rights, both historical and modern, and Aboriginal title in the *Constitution Act, 1982*. When the numbered treaties were negotiated in the nineteenth and twentieth centuries, the terms of treaties stipulated that the Crown would provide a certain amount of land per person. An Indian band has a TLE shortfall when it has not received all land it may be entitled to under an historic treaty.

While Treaties 1 to 11 include specific references to the amount of land owed per person, there is less clarity about the population to be counted and when. At the time of reserve creation, band populations were in flux. Some bands increased in population after the colonial governments had done its first population count as new people joined for the first time or moved in from other bands.

When calculations were done, in some cases, bands were found to have a shortfall of land. Previously, historic shortfall entitlements were based on the original band population count. The new approach will ensure TLEs will no longer be based solely on the government's original band population count but will include people who joined bands shortly afterwards and were not counted under any other treaty settlement. Counting these "late additions" more fairly reflects the dynamic of band populations of the time.

The new approach was prompted by the Indian Claims Commission's (ICC) review of the Fort McKay and Kawacatoose TLE claims after both were rejected by Canada. This approach reflects one of the main ICC recommendations to count "late additions" in TLE claims. It will enable Canada to accept these two First Nations claims for negotiation.

The ICC, created in 1991, is mandated under the federal *Inquiries Act* to review specific claims rejected by Canada and make recommendations.

For Information:

Lynne Boyer
DIAND Communications
(819) 997-8404

APPENDIX B

BIGSTONE CREE NATION TREATY LAND ENTITLEMENT INQUIRY

1 **Planning conference** July 25, 1996

2 **Community sessions**

The Commission held three community sessions.

1st community session: Desmarais on October 29, 1996, heard from Chief Mel Beaver, Alphonse Auger, Louise Auger, Daniel Beaver, Rita Auger, Tommy Auger, and Veronique Gladu.

Trout Lake on October 30, 1996, heard from Harry Houle, Solomon Noskiye, Johnny Noskiye, Peter Letendre and Johnny Ossimeemas.

2nd community session: Desmarais, July 3, 1997, heard from Alphonse Auger, Tommy Auger, George A. Yellowknee, Elzear O'rr, Arnold O'rr, Louise Yellowknee, Rita Auger, Mary Jane Pichie, Freddie Gambler, Margaret Gambler, Agatha Gambler, Barbara Nenamahoo.

3rd community session: Peerless Lake, December 9, 1997, heard from Felix Noskiye, Louis Cardinal, George Cardinal, Solomon Noskiye, George Noskiye, Peter Letendre, Emil Burnttail, Wilfred Cardinal, Victor Cardinal.

3 **Prehearing conference** January 22, 1997
February 17, 1997

4 Content of formal record

The formal record for the Big Stone Cree Nation Treaty Land Entitlement Inquiry consists of the following materials:

- 46 exhibits tendered during the inquiry
- transcript of community sessions

The report of the Commission and letters of transmittal to the parties will complete the formal record of this inquiry.

RESPONSES

Re: Mamaleleqala Qwe'Qwa'Sot'Enox Band McKenna-McBride Applications
Robert D. Nault, Minister of Indian Affairs and Northern Development,
to Chief Robert Sewid
December 8, 1999
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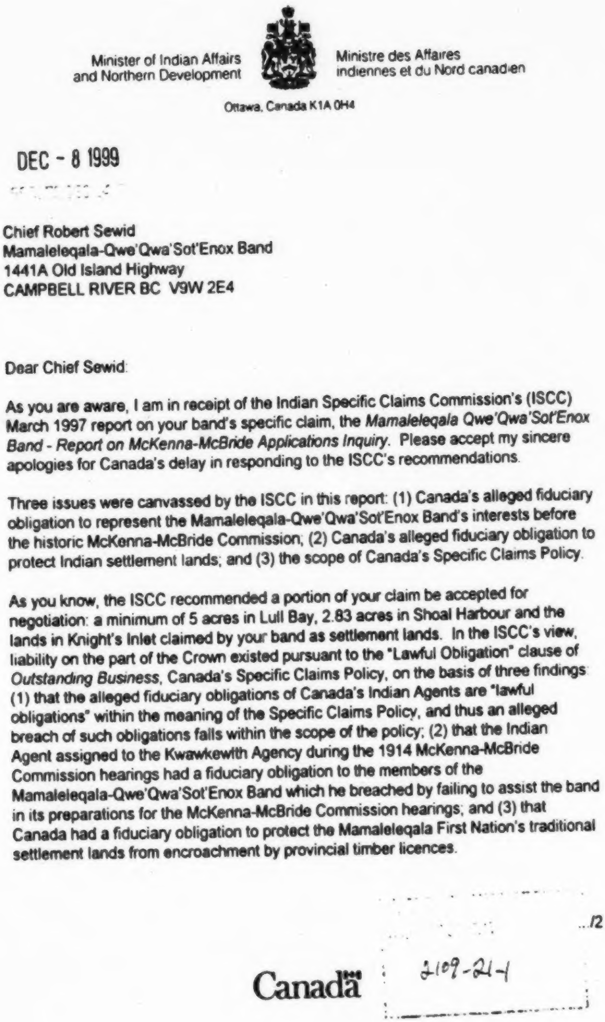
Re: 'Na̲mgis First Nation McKenna-McBride Applications
Robert D. Nault, Minister of Indian Affairs and Northern Development,
to Chief Councillor William Cranmer,
December 8, 1999
395



Minister of Indian Affairs
and Northern Development

Ministre des Affaires
indiennes et du Nord canadien

Ottawa, Canada K1A 0H4

DEC - 8 1999

Chief Robert Sewid
Mamaleleqala-Qwe'Qwa'Sot'Enox Band
1441A Old Island Highway
CAMPBELL RIVER BC V9W 2E4

Dear Chief Sewid:

As you are aware, I am in receipt of the Indian Specific Claims Commission's (ISCC) March 1997 report on your band's specific claim, the *Mamaleleqala Qwe'Qwa'Sot'Enox Band - Report on McKenna-McBride Applications Inquiry*. Please accept my sincere apologies for Canada's delay in responding to the ISCC's recommendations.

Three issues were canvassed by the ISCC in this report: (1) Canada's alleged fiduciary obligation to represent the Mamaleleqala-Qwe'Qwa'Sot'Enox Band's interests before the historic McKenna-McBride Commission; (2) Canada's alleged fiduciary obligation to protect Indian settlement lands; and (3) the scope of Canada's Specific Claims Policy.

As you know, the ISCC recommended a portion of your claim be accepted for negotiation: a minimum of 5 acres in Lull Bay, 2.83 acres in Shoal Harbour and the lands in Knight's Inlet claimed by your band as settlement lands. In the ISCC's view, liability on the part of the Crown existed pursuant to the "Lawful Obligation" clause of *Outstanding Business*, Canada's Specific Claims Policy, on the basis of three findings: (1) that the alleged fiduciary obligations of Canada's Indian Agents are "lawful obligations" within the meaning of the Specific Claims Policy, and thus an alleged breach of such obligations falls within the scope of the policy; (2) that the Indian Agent assigned to the Kwawkewith Agency during the 1914 McKenna-McBride Commission hearings had a fiduciary obligation to the members of the Mamaleleqala-Qwe'Qwa'Sot'Enox Band which he breached by failing to assist the band in its preparations for the McKenna-McBride Commission hearings; and (3) that Canada had a fiduciary obligation to protect the Mamaleleqala First Nation's traditional settlement lands from encroachment by provincial timber licences.

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Canada

2109-21-1

- 2 -

After careful consideration of the Commission's report, I regret that I am unable to accept the ISCC's recommendation to accept this claim on the basis outlined above Canada's response to each of the ISCC's findings is as follows:

(1) Canada rejects the ISCC's finding that the enumerated examples of "lawful obligation" outlined in *Outstanding Business* were not intended to be exhaustive Canada is of the view that outside the circumstances outlined in the "lawful obligation" and "beyond lawful obligation" clauses of *Outstanding Business* (i.e. a treaty obligation, statutory requirement and/or responsibility for management of Indian land or assets), fiduciary obligations are not "lawful obligations" within the meaning of the Specific Claims Policy. Only those fiduciary obligations arising within the context of lawful obligations (as defined in the policy) may fall within the scope of *Outstanding Business*.

(2) Canada takes the position that: (a) there is no general fiduciary duty in relation to Aboriginal interests in non-reserve lands; and (b) the necessary elements required to establish a fiduciary obligation (i.e. a statute, agreement or unilatera undertaking to act for or in the interests of the First Nation; unilateral power to affect the First Nation's interests; and/or vulnerability on the part of the First Nation to the exercise of that power) were not present on the facts of this claim.

(3) Canada's position remains, as has been articulated in response to other British Columbia specific claims dealing with the issue of Indian settlement lands, that there is no general fiduciary obligation to protect traditional Indian settlement lands from the actions of other individuals or governments.

I know that this claim was important to you and to the other members of the Mamaleleqala-Qwe'Qwa'Sot'Enox First Nation. Should you wish further clarification of Canada's position, representatives of the Specific Claims Branch and the Department of Justice would be pleased to meet with you and members of your First Nations. Arrangements for such a meeting may be coordinate with Ms. Deborah McIntosh of the Specific Claims Branch, who can be reached at (604) 775-8139.

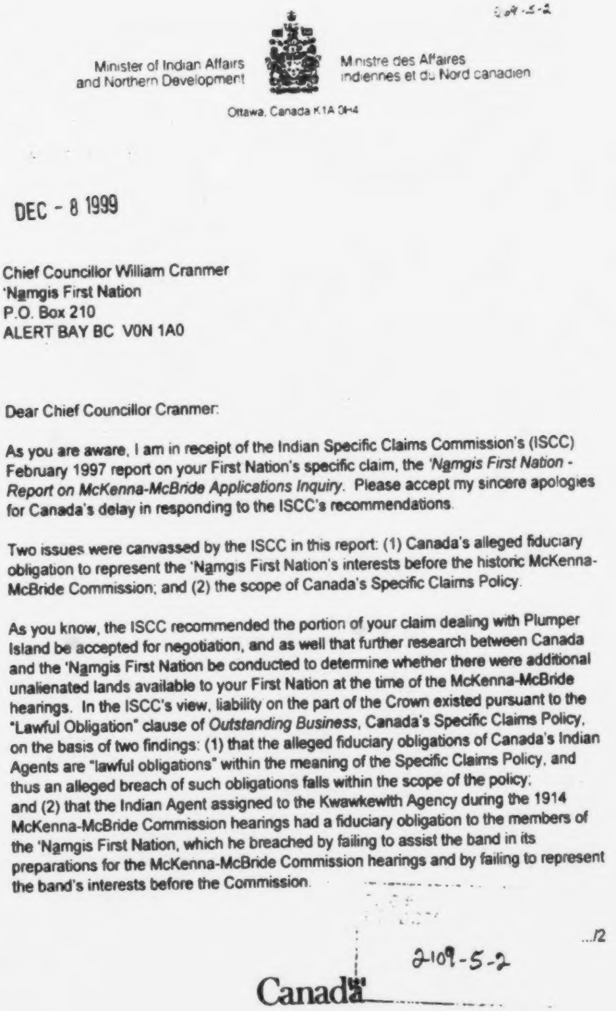
I truly regret my inability to resolve your grievance under the Specific Claims Policy

Yours sincerely,

ORIGINAL SIGNED BY
ORIGINAL SIGNÉ PAR
ROBERT D. NAULT

Robert D. Nault, P.C., M.P.

c.c.: Mr. Daniel J. Bellegarde
Mr. James Prentice
Mr. Allan Donovan



2109-5-2

Minister of Indian Affairs
and Northern Development

Ministre des Affaires
indiennes et du Nord canadien

Ottawa, Canada K1A 0H4

DEC - 8 1999

Chief Councillor William Cranmer
'Namgis First Nation
P.O. Box 210
ALERT BAY BC V0N 1A0

Dear Chief Councillor Cranmer:

As you are aware, I am in receipt of the Indian Specific Claims Commission's (ISCC) February 1997 report on your First Nation's specific claim, the *'Namgis First Nation - Report on McKenna-McBride Applications Inquiry*. Please accept my sincere apologies for Canada's delay in responding to the ISCC's recommendations.

Two issues were canvassed by the ISCC in this report: (1) Canada's alleged fiduciary obligation to represent the 'Namgis First Nation's interests before the historic McKenna-McBride Commission; and (2) the scope of Canada's Specific Claims Policy.

As you know, the ISCC recommended the portion of your claim dealing with Plumper Island be accepted for negotiation, and as well that further research between Canada and the 'Namgis First Nation be conducted to determine whether there were additional unalienated lands available to your First Nation at the time of the McKenna-McBride hearings. In the ISCC's view, liability on the part of the Crown existed pursuant to the "Lawful Obligation" clause of *Outstanding Business*, Canada's Specific Claims Policy, on the basis of two findings: (1) that the alleged fiduciary obligations of Canada's Indian Agents are "lawful obligations" within the meaning of the Specific Claims Policy, and thus an alleged breach of such obligations falls within the scope of the policy; and (2) that the Indian Agent assigned to the Kwawkewlth Agency during the 1914 McKenna-McBride Commission hearings had a fiduciary obligation to the members of the 'Namgis First Nation, which he breached by failing to assist the band in its preparations for the McKenna-McBride Commission hearings and by failing to represent the band's interests before the Commission.

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Canada

After careful consideration of the Commission's report, I regret that I am unable to accept the ISCC's recommendation to accept this claim on the basis outlined above. Canada's response to each of the ISCC's findings is as follows:

(1) Canada rejects the ISCC's finding that the enumerated examples of "lawful obligation" outlined in *Outstanding Business* were not intended to be exhaustive. Canada is of the view that outside the circumstances outlined in the "lawful obligation" and "beyond lawful obligation" clauses of *Outstanding Business* (i.e. a treaty obligation, statutory requirement and/or responsibility for management of Indian land or assets), fiduciary obligations are not "lawful obligations" within the meaning of the Specific Claims Policy. Only those fiduciary obligations arising within the context of lawful obligations (as defined in the policy) may fall within the scope of *Outstanding Business*.

(2) Canada takes the position that: (a) there was no general fiduciary obligation on the part of the federal Crown to protect and/or promote the interests of the 'Na̲mgis First Nation before the McKenna-McBride Commission; and (b) the necessary elements required to establish a fiduciary obligation in this particular context (i.e. a statute, agreement or unilateral undertaking to act for or in the interests of the First Nation; unilateral power to affect the First Nation's interests; and/or reliance on or vulnerability to these things by the First Nation) were not present on the facts of this claim.

I know that this claim was important to you and to the other members of the 'Na̲mgis First Nation. Should you wish further clarification of Canada's position, representatives of the Specific Claims Branch and the Department of Justice would be pleased to meet with you and members of your First Nations. Arrangements for such a meeting may be coordinate with Ms. Deborah McIntosh of the Specific Claims Branch, who can be reached at (604) 775-8139.

I truly regret my inability to resolve your grievance under the Specific Claims Policy.

Yours sincerely,

ORIGINAL SIGNED BY
ORIGINAL SIGNÉ PAR
ROBERT D. NAULT

Robert D. Nault, P.C., M.P.

c.c.: Mr. Daniel J. Bellegarde
Mr. James Prentice
Mr. Stan H. Ashcroft

THE COMMISSIONERS

Co-Chair Daniel J. Bellegarde is an Assiniboine/Cree from the Little Black Bear First Nation in southern Saskatchewan. From 1981 to 1984, Mr Bellegarde worked with the Meadow Lake District Chiefs Joint Venture as a socio-economic planner. He was president of the Saskatchewan Indian Institute of Technologies from 1984 to 1987. In 1988, he was elected first vice-chief of the Federation of Saskatchewan Indian Nations, a position he held until 1997. He is currently president of Dan Bellegarde & Associates, a consulting firm specializing in strategic planning, management and leadership development, self-governance, and human resource development in general. Mr Bellegarde was appointed Commissioner and then Co-Chair of the Indian Claims Commission in July 1992 and April 1994, respectively.

Co-Chair P.E. James Prentice, QC, is a lawyer with the Calgary law firm of Rooney Prentice. He has an extensive background in native land claims, commencing with his work as legal counsel and negotiator for the Province of Alberta in the tripartite negotiations that brought about the Sturgeon Lake Indian Claims Settlement of 1989. Since that time, Mr Prentice has participated in the inquiry or mediation of some 70 treaty land entitlement and surrender claims across Canada. Mr Prentice was appointed Queen's Counsel in 1992. He has also been the facility leader at the Banff Centre for Management's annual program on Specific Claims since 1994. He was appointed Commissioner and then Co-Chair of the Indian Claims Commission in July 1992 and April 1994, respectively.

Roger J. Augustine is a Mi'kmaq born at Eel Ground, New Brunswick, where he served as Chief from 1980 to 1996. He was elected president of the Union of NB-PEI First Nations in 1988, and completed his term in January 1994. He has received the prestigious Medal of Distinction from the Canadian Centre on Substance Abuse for 1993 and 1994 in recognition of his efforts in founding and fostering both the Eel Ground Drug and Alcohol Education Centre and the Native Alcohol and Drug Abuse Rehabilitation Association. In June 1996, he was named Miramichi Achiever of the Year by the Miramichi Regional Development Corporation. He was appointed Commissioner in July 1992.

Carole T. Corcoran is a Dene from the Fort Nelson Indian Band in northern British Columbia. Mrs Corcoran is a lawyer with extensive experience in aboriginal government and politics at the local, regional, and provincial levels. She served as a Commissioner on the Royal Commission on Canada's Future in 1990/91, and as a Commissioner to the British Columbia Treaty Commission from 1993 to 1995. She was appointed Commissioner in July 1992.

Elijah Harper is an Ojibwa-Cree born in Red Sucker Lake, Manitoba, where he was Chief from 1978 to 1981. Mr Harper is best known for his role in the debate surrounding the Meech Lake Accord, during which, as an opposition member for Rupertsland in the Manitoba Legislative Assembly (1981-92), he stood silently, holding a sacred Eagle's feather in a symbolic stand against the Accord, to protest the lack of adequate participation and recognition of aboriginal people in the constitutional amendment process. In 1986, Mr Harper was appointed Minister without Portfolio Responsible for Native Affairs and, in 1987, Minister of Northern Affairs. He was instrumental in setting up the Manitoba Aboriginal Justice Inquiry. Between 1993 and 1997, he sat as a Liberal Member of Parliament for Churchill, Manitoba. In 1995, Mr Harper launched a Sacred Assembly to promote spiritual reconciliation and healing between aboriginal and non-aboriginal Canadians, which brought together people of all faiths from across Canada. In 1996, Mr Harper received a National Aboriginal Achievement Award for public service. He was appointed Commissioner in January 1999.

Sheila G. Purdy has been an advisor to the Government of the Northwest Territories on justice and other matters relating to the territorial division and the creation of Nunavut. From 1993 to 1996, she was senior policy advisor to the Minister of Justice and the Attorney General of Canada on a number of justice issues, including aboriginal justice, the Canadian Human Rights Act, and violence against women. From 1991 to 1993, she was policy analyst to the National Liberal Caucus Research Bureau for the constitution, justice, aboriginal affairs, women, human rights, and the Solicitor General. In 1992 and 1993, she was special advisor on aboriginal affairs to the Office of the Leader of the Opposition and from 1989 to 1991 she was a legal consultant on environmental issues. She has been active in advocating against abuse of the elderly and is a co-author of *Elder Abuse: The Hidden Crime*. In 1988, she received the Award of Merit from Concerned Friends for her work in this area. She worked as a lawyer in private practice from 1982 to 1985 after graduating with a law degree from the University of Ottawa in 1980. She was appointed Commissioner in May 1999.